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No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

FLOYD T. BRYAN, and
FLOYD T. BRYAN, M.D., P.A., Petitioners,

v.

JAMES E. HOLMES REGIONAL MEDICAL CENTER,
a/k/a HOLMES REGIONAL MEDICAL CENTER, INC.,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

VOLUME I

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BRYAN v. JAMES E. HOLMES REGIONAL MEDICAL CENTER

Floyd T. BRYAN; Floyd T. Bryan, M.D., P.A., Plaintiffs-Appellees, Cross-Appellants,

v.

JAMES E. HOLMES REGIONAL MEDICAL CENTER, a/k/a Holmes Regional Medical Center, Inc., Defendant-Appellant, Cross-Appellee,

Raymond A. Armstrong, M.D., individually and as Chairman, Department of Surgery, HRMC and as Member of the Board of Directors, HRMC; Richard N. Baney, M.D., individually and as Member of the Board of Directors, HRMC; Michael J. Foley, M.D., individually and as Medical Director, HRMC; Michael V. Gatto, individually and as Member of the Board of Directors, HRMC; James E. Gray, III, individually and as Secretary of the Board of Directors, HRMC; Joseph A. Gurri, M.D., individually and as Chief of the Medical Staff, HRMC; Martin W. Isenman, M.D., individually and as Member of the Board of Directors, HRMC; David M. Jones, Maj. Gen. (Retired), individually and as Treasurer of the Board of Directors, HRMC; Michael F. Maguire, individually and as Member of the Board of Directors, HRMC; Fred L. McFarlin, individually and as Member of the Board of Directors, HRMC; John E. Miller, Ph.D., individually and as Second Vice Chairman of the Board of Directors, HRMC; Barry A. Mills, M.D., individually and as Chairman, Executive Committee, HRMC; Lyle Saltzman, M.D., individually and as Member of the Executive Committee, HRMC; Val M. Steele, individually and as Member of the Board of

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Directors, HRMC; Lynn Stoldt, R.N., individually and as Head Operating Room Nurse, HRMC; Russell P. Sullivan, Jr., individually and as Chairman of the Board of Directors, HRMC; John F. Turner, Jr., individually and as First Vice Chairman of Board of Directors, HRMC; Rita Wheeler, R.N., individually and as Operating Room Supervisor, HRMC, Defendants.

No. 92-2963.

United States Court of Appeals,
Eleventh Circuit.

Oct. 4, 1994.

Physician brought action against hospital that terminated his staff privileges. The United States District Court for the Middle District of Florida, No. 90-896-ORL-18, G. Kendall Sharp, Jr., entered judgment in favor of physician, and hospital appealed. The Court of Appeals, Tjoflat, Chief Judge, held that hospital was immune from liability for monetary damages under Health Care Quality Improvement Act (HCQIA).

Reversed.

1. Hospitals --6

HCQIA immunity is question of law for court to decide and may be resolved whenever record in particular case becomes sufficiently developed. Health Care Quality Improvement Act of 1986, §§ 402-432, 42 U.S.C.A. §§ 11101-11152.

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2. Hospitals --6

Congress intended HCQIA to permit defendants in suits arising out of peer review disciplinary decisions to file motions to resolve issues concerning immunity from monetary liability as early as possible in litigation process. Health Care Quality Improvement Act of 1986, §§ 402432, 42 U.S.C.A. §§ 11101-11152.

3. Federal Civil Procedure --2554

Hospitals --6

Although immunity under HCQIA may be determined at summary judgment stage, resolution of that issue may be deferred until or after trial if standards of summary judgment rule cannot be satisfied; substantive standards under HCQIA remain the same regardless of point at which immunity determination occurs. Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A.; Health Care Quality Improvement Act of 1986, §§ 402-432, 42 U.S.C.A. §§ 11101-11152.

4. Federal Civil Procedure --2554

District court should consider issue of HCQIA immunity from damages at summary judgment stage; if it determines that defendant is not entitled to such protection, then merits of case should be submitted to jury without reference to immunity issue. Fed. Rules Civ.Proc.Rule 56, 28 U.S.C.A.; Health Care Quality Improvement Act of 1986, §§ 402-432, 42 U.S.C.A. §§ 11101-11152.

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5. Federal Civil Procedure --2214

Hospitals --6

If there are disputed subsidiary issues of fact concerning HCQIA immunity, such as whether disciplined physician was given adequate notices of charges and appropriate opportunity to be heard, court may ask jury to resolve subsidiary factual questions by responding to special interrogatories; under no circumstances should ultimate question of whether defendant is immune from monetary liability under HCQIA be submitted to jury. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.; Health Care Quality Improvement Act of 1986, §§ 402-432, 42 U.S.C.A. §§ 11101-11152.

6. Federal Civil Procedure --2546

In ruling on motion for summary judgment on issue of hospital's immunity from liability under HCQIA, court's inquiry focuses on whether physician provided sufficient evidence to permit jury to find that physician had overcome, by preponderance of the evidence, presumption that hospital would reasonably have believed that it had met standards of immunity provision. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.; Health Care Quality Improvement Act of 1986, § 412(a), 42 U.S.C.A. § 11112(a).

7. Hospitals --6

If jury returns verdict awarding damages to disciplined physician but evidence at trial conclusively demonstrates that defendant has satisfied HCQIA standards for peer review

procedures, thereby being entitled to immunity from monetary liability, then court should grant posttrial judgment as matter of law. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.; Health Care Quality Improvement Act of 1986, § 412(a), 42 U.S.C.A. § 11112(a).

8. Hospitals --6

Decision by hospital's board of directors to revoke physician's staff privileges, based on recommendation of peer review panel and executive committee, was "professional review action" within meaning of HCQIA. Health Care Quality Improvement Act of 1986, § 431(9), 42 U.S.C.A. § 11151(9).

See publication Words and Phrases for other judicial constructions and definitions.

9. Hospitals --6

Hospital's board of directors acted as a "professional review body" within meaning of HCQIA when they decided to revoke physician's staff privileges. Health Care Quality Improvement Act of 1986, § 431(4)(a)(i), (11), 42 U.S.C.A. § 11151(4)(a)(i), (11).

See publication Words and Phrases for other judicial constructions and definitions.

10. Hospitals --6

Hospital's termination of physician's clinical privileges met

requirements of HCQIA, entitling hospital to immunity from liability for monetary damages; revocation was prompted by reasonable belief that doing so would promote quality health care, in view of physician's pattern of unprofessional conduct over period of many years, decision was made only after physician's conduct had been evaluated by executive committee, peer review panel, and appellate review panel, and hospital complied with statutory procedural requirements. Health Care Quality Improvement Act of 1986, §§ 411(a), 412(a, b), 42 U.S.C.A. §§ 11111(a), 11112(a, b).

11. Hospitals --6

Hospital's decision to terminate physician's clinical privileges was taken "in the reasonable belief that the action was in the furtherance of quality health care," within meaning of immunity provision of HCQIA; physician had exhibited pattern of unprofessional conduct over period of many years, was given series of opportunities to remedy his difficulties in interacting with other staff members, and hospital concluded that physician's presence in operating room and patients' rooms was disruptive and interfered with important work of other employees. Health Care Quality Improvement Act of 1986, § 412(a)(1), 42 U.S.C.A. § 11112(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

12. Hospitals --6

Hospital's board of directors decided to terminate physician's staff privileges "after a reasonable effort to obtain

the facts of the matter," within meaning of HCQIA immunity provision; board terminated physician's privileges only after his conduct had been evaluated by executive committee, peer review panel, and appellate review panel. Health Care Quality Improvement Act of 1986, § 412(a)(2), 42 U.S.C.A. § 11112(a)(2).

See publication Words and Phrases for other judicial constructions and definition.

13. Hospitals --6

Hospital's board of directors satisfied procedural requirements of HCQIA when terminating physician's staff privileges, as required to be entitled to immunity from liability for monetary damages; hospital complied with notice requirements, hearings were held in timely fashion in accordance with hospital bylaws, and physician was afforded full rights of representation, cross-examination, and confrontation, Health Care Quality Improvement Act of 1986, § 412(a)(3), (b), 42 U.S.C.A. § 11112(a)(3), (b).

14. Hospitals --6

Hospital board's decision to terminate physician's staff privileges was made "in the reasonable belief that the action was warranted by the facts known," within meaning of HCQIA immunity provision; physician conceded that incidents that led to his termination actually occurred, and hospital had reasonable belief that termination was warranted. Health Care Quality Improvement Act of 1986, § 412(a)(4), 42 U.S.C.A. § 11112(a)(4).

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See publication Words and Phrases for other judicial constructions and definitions.

Appeals from the United States District Court for the Middle District of Florida.

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and DYER, Senior Circuit Judge.

TJOFLAT, Chief Judge:

In this case, a Florida hospital, after completing a lengthy internal disciplinary process, terminated the clinical staff privileges of a staff physician. The physician sued the hospital, alleging various state and federal causes of action and seeking money damages. After an eleven-day trial, a federal jury concluded that the hospital had revoked the physician's staff privileges in violation of its bylaws and awarded the physician nearly $4.2 million in damages for breach of contract. The hospital appeals that judgment as well as the district court's denial of its post-trial motion for judgment as a matter of law, which contended that the hospital was immune from liability in money damages under the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. §§ 11101-11152 (1988 & Supp. IV 1992), and under Florida law, Fla. Stat.Ann. § 395.0193(5) (West 1993). Because we conclude that the hospital was entitled to protection from monetary liability under HCQIA, we reverse.

I.

Peer review, the process by which physicians and hospitals

evaluate and discipline staff doctors, has become an integral component of the health care system in the United States. Congress enacted the Health Care Quality Improvement Act to encourage such peer review activities, "to improve the quality of medical care by encouraging physicians to identify and discipline other physicians who are incompetent or who engage in unprofessional behavior." H.R.Rep. No. 903, 99th Cong., 2d Sess. 2, *reprinted in* 1986 U.S.C.C.A.N. 6287, 6384, 6384 *[sic]*. Congressional findings, recited in the text of the statute itself, note that "[t]he increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State," 42 U.S.C. § 11101(l), and that these problems "can be remedied through effective professional peer review," *id.* § 11101(3). In furtherance of this goal, HCQIA grants limited immunity, in suits brought by disciplined physicians, from liability for money damages to those who participate in professional peer review activities. *Id.* § 11111(a).

Prior to the passage of HCQIA, the specter of litigation seriously impeded the development and vigorous enforcement of hospital peer review procedures. Congress found that "[t]he threat of private money damage liability under [state and] Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review." *Id.* § 11101(4).[1] Accordingly, HCQIA provides that, if a "profes-

[1] *See also* H.R.Rep. No. 903, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 6385 (noting that "[e]ven though defendants may often win these lawsuits, that may not be sufficient to guarantee enthusiastic, or even minimally

sional review action" (as defined in the statute) meets certain due process and fairness requirements, then those participating in such a review process shall not be liable under any state or federal law for damages for the results. *Id.* § 11111(a)(1). Thus, "[d]octors and hospitals who have acted in accordance with the reasonable belief, due process, and other requirements of [HCQIA] are protected from damages sought by a disciplined doctor." H.R.Rep. 903, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 6385.

HCQIA is designed to facilitate the frank exchange of information among professionals conducting peer review inquiries without the fear of reprisals in civil lawsuits.[2] The

adequate, peer review" because "[doctors who are sufficiently fearful of the threat of litigation will simply not do meaningful peer review").

[2] In another set of provisions, HCQIA requires health care entities to report certain specific disciplinary actions taken against a staff physician (or the acceptance of a resignation or suspension in return for not conducting investigations or disciplinary proceedings) to a national clearinghouse established to collect and disseminate information on health care providers. 42 U.S.C. §§ 11133-34. Then, prior to admitting a physician to its staff, a hospital must obtain that physician's records from the clearinghouse. *Id.* § 11135. These reporting requirements were designed to "restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance." *Id.* § 11101(2) (reciting congressional findings). Congress recognized that physicians faced with disciplinary action, no longer able to hide their previous discipline, would feel compelled to challenge any action taken against them in the courts. *See* H.R.Rep. No. 903, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 6385. Accordingly, the reporting requirements increased the need to protect peer

statute attempts to balance the chilling effect of litigation on peer review with concerns for protecting physicians improperly subjected to disciplinary action; accordingly, Congress granted immunity from monetary damages to participants in properly conducted peer review proceedings while preserving causes of action for injunctive or declaratory relief for aggrieved physicians. Because the statutory scheme is somewhat convoluted, we discuss the immunity provisions in detail.[3]

review participants from liability.

The Secretary of Health and Human Services may, following an investigation, publish in the Federal Register the name of a health care entity that has failed to comply with these reporting requirements; a hospital so identified then loses the protection of HCQIA immunity provisions for three years. 42 U.S.C. § 11111(b).

[3] It is important to note that we use the term "immunity" here in a limited sense. *See* H.R.Rep. No. 903, at 3, *printed in* 1986 U.S.C.C.A.N. at 6385. HCQIA establishes an immunity only from liability for money damages, not a right to avoid standing trial. As the Tenth Circuit has concluded, "[t]he plain meaning of [42 U.S.C. § 11111(a)(1)] is that professional review bodies and covered individuals who satisfy the requirements of § 11112(a) are immune from liability only. On its face, the provision does not explicitly establish immunity from suit." *Decker v. IHC Hosps., Inc.*, 982 F.2d 433, 436 (10th Cir.1992) (footnote omitted) (holding that motions to dismiss based on HCQIA immunity are not immediately appealable), *cert. denied*, --- U.S. ---, 113 S.Ct. 3041, 125 L.Ed.2d 727 (1993); *accord Manion v. Evans*, 986 F.2d 1036, 1042 (6th Cir.1993).

This reading of the statute comports with the legislative history surrounding its adoption. According to the report of the House Committee on Energy and Commerce:

Initially, the Committee considered establishing a very broad protection

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The provision of HCQIA that limits the availability of damages for professional review actions provides as follows:

> If a professional review action (as defined in . . . this title) of a professional review body meets all the standards specified in section 11112(a) of this title, . . .
>
> (A) the professional review body,
>
> (B) any person acting as a member or staff to the body,
>
> (C) any person under a contract or other formal agreement with the body, and
>
> (D) any person who participates with or assists the body with respect to the action,
>
> shall not be liable in damages under any law of the United States or of any State (or Political subdivision thereof) with respect to the action.

from suit for professional review actions. In response to concerns that such protection might be abused and serve as a shield for anti-competitive economic actions under the guise of quality controls, however, the Committee restricted the broad protection. As redrafted, the bill now provides protection only from damages in private actions, and only for proper peer review, as defined in the bill.

H.R.Rep. No. 903, at 9, *reprinted in* 1986 U.S.C.C.A.N. at 6391.

42 U.S.C. § 11111(a)(1).[4] The standards that professional review actions must satisfy to entitle the participants to such protection are enumerated in section 11112(a) as follows:

> For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken--
>
> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted

[4] Section 11111(a)(1) expressly excludes from its coverage suits brought under 42 U.S.C. § 1983 or Title VII of the Civil Rights Act of 1964, but it clearly *does* apply to antitrust claims. *See Patrick v. Burget*, 486 U.S. 94, 105 n. 8, 108 S.Ct. 1658, 1665 n. 8, 100 L.Ed.2d 83 (1988). The section states, however, that [n]othing in this paragraph shall prevent the United States or Attorney General of a State from bringing an action, including an action under [section 4C of the Clayton Act, 15 U.S.C. § 15C], where such an action is otherwise authorized." 42 U.S.C. § 11111(a)(1). And HCQIA "does not restrict the rights of physicians who are disciplined to bring private causes of action for injunctive or declaratory relief." H.R.Rep. No. 903, at 9, *reprinted in* 1986 U.S.C.C.A.N. at 6391.

by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

Id. § 11112(a). Importantly, HCQIA also creates a rebuttable presumption of immunity: "A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence." *Id.*

Section 11112(b) of HCQIA then enumerates the minimum, or "safe harbor" procedures that will, in every case, satisfy the adequate notice and hearing requirement of section 11112(a)(3). *Id.* § 11112(b). Organized in the form of a detailed checklist, the provision defines what hospitals conducting peer review disciplinary procedures must do to obtain the Act's protection for itself and the members of its peer review bodies. We discuss this checklist in more detail *infra* in part III. Congress was careful to explain, however, that "[a] Professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section." *Id.*

The legislative history of section 11112(a) indicates that the statute's reasonableness requirements were intended to create an objective standard of performance, rather than a subjective good faith standard. As the House Committee on Energy and Commerce explained:

> Initially, the Committee considered a "good faith" standard for professional review actions. In response to

> concerns that "good faith" might be misinterpreted as requiring only a test of the subjective state of mind of the physicians conducting the professional review action, the Committee changed to a more objective "reasonable belief" standard. The Committee intends that this test will be satisfied if the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients.

H.R.Rep. No. 903, at 10, *printed in* 1986 U.S.C.C.A.N. at 6392-93. *See Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir.1992) (holding that HCQIA reasonableness requirements create an objective standard, rather than a good faith requirement).

A review of the facts of this case reveal that HCQIA's limitations on monetary liability dictate the outcome of this appeal.

II.

The appellant, Holmes Regional Medical Center ("Holmes" or "the Hospital"), is a nonprofit corporation operating a private hospital in Melbourne, Florida. The appellee, Dr. Floyd T. Bryan, is a board-certified physician who specializes in general and vascular surgery.[5] Bryan became a member of

[5] The appellees are Bryan and his professional organization, Floyd T. Bryan, M.D., P.A. We refer to them collectively as "Bryan" for convenience.

the Holmes medical staff in 1976; he is generally acknowledged to be an excellent surgeon, often undertaking long, detailed vascular procedures that other physicians in the field avoid. Bryan also has a reputation for being a volcanic-tempered perfectionist, a difficult man with whom to work, and a person who regularly viewed it as his obligation to criticize staff members at Holmes for perceived incompetence or inefficiency. Hospital employees, however, often viewed Bryan's "constructive criticism" as verbal --or even physical-- abuse. Because the Holmes board of directors found Bryan's behavior inappropriate and unprofessional, it terminated his medical staff privileges in November 1990. The means by which Holmes accomplished this termination is the subject of the dispute in this case.

A.

The organizational structure at Holmes, as is the case at most hospitals, is bifurcated, reflecting the distinct roles of the Hospital Administration and of the medical staff. Holmes is governed by a board of directors, comprised mostly of non-physicians, that retains the ultimate responsibility for the operation of the facility. The board employs a staff, led by a president and chief executive officer ("CEO"), to manage the hospital on a day-to-day basis. The medical staff organization, which consists of all doctors with privileges to practice at Holmes, represents the physicians in the Hospital's government. The medical staff is led by an elected chief of staff who presides over the medical executive committee, which comprises the chairpersons of the various clinical departments as well as several officers elected by the staff at large.

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The Holmes board of directors promulgates bylaws for the medical staff, by which all physicians receiving staff privileges at the Hospital agree to be bound. The bylaws provide a detailed series of procedures for handling physician disciplinary actions. Under those bylaws, the medical staff, through its executive committee, may recommend that the board of directors suspend or revoke the privileges of a physician". Although the board retains the ultimate authority over staff privileges, the recommendations of the medical staff are given considerable weight. This system, which is known as peer review, is designed to raise the quality of medical care by encouraging physicians to police themselves. Florida law mandates that hospitals provide for peer review of their staff doctors.[6]

Under the Holmes bylaws, certain hospital officials may request an executive committee investigation[7] into a physician's conduct if the medical staff member fails to comply with the ethics of the medical profession or with the Hospital's bylaws, or if "the Staff appointee is unable to work harmoniously with others to the extent that it affects the orderly operation of the hospital or Medical Staff

[6] *See* Fla.Stat.Ann. § 395.0193(2) (West 1993) ("Each licensed [health care] facility, as a condition of licensure, shall provide for peer review of physicians who deliver health care services at the facility.").

[7] Investigations may be requested, according to the bylaws, by various officers of the medical staff, including the chairpersons of *various committees* and clinical departments. Such requests must be made in writing to the executive committee and must refer to the specific conduct that constitutes the basis for the request.

organization." Grounds for investigation also include questions regarding a physician's clinical competence or his care and treatment of patients.

Once an investigation is initiated, the executive committee is charged with making a recommendation to the board of directors concerning the level of discipline that should be imposed.[8] The executive committee's recommendation may range from a written warning to revocation of clinical privileges, but a recommendation involving the reduction, suspension, or revocation of clinical privileges entitles the physician to the extensive procedural hearing rights outlined in the bylaws. The executive committee's recommendation is forwarded to the CEO of the hospital, who notifies the physician under scrutiny. The physician has twenty days from receipt of the notice to make a written request for a hearing. If the physician waives his or her right to a hearing, the CEO forwards the recommendation (along with the supporting documentation) to the board of directors for a final disposition

[8] All or part of the physician's privileges may be suspended temporarily pending the outcome of the inquiry. The relevant provision of the bylaws provides:

> At any time during the investigation, the Executive Committee or the Medical Staff President or his designee may suspend all or any part of the clinical privileges of the individual being investigated. This suspension shall be deemed to be administrative in nature, for the protection of hospital patients. It shall be in effect during the investigation only, shall not indicate the truth of the charges, and shall remain in force, without appeal, during the course of the investigation.

of the matter.[9]

When a physician requests a formal hearing, the executive committee appoints a hearing panel consisting of seven members of the medical staff who have not taken active part in consideration of the matter contested; mere knowledge of the matter does not preclude a staff member from serving on a hearing panel. According to the bylaws, "[t]he purpose of the hearing shall be to recommend a course of action to those acting for the hospital.... [T]he duties of the Hearing Panel shall be so defined and so carried out."

The medical staff bylaws contain detailed procedures governing the hearing process, including provisions for written notice of the time and place for the hearing, prompt scheduling, and lists of witnesses. The physician requesting the hearing is entitled to representation, and has full rights of cross-examination and confrontation of witnesses. The executive committee designates someone, who may be an attorney, to present the disciplinary recommendation that led

[9] The procedure is slightly different when the executive committee settles on a less severe form of discipline. If the action of the executive committee does not involve the reduction, suspension, or revocation of staff privileges, the bylaws provide that "it shall take effect immediately without action of, and without the right of appeal to the Board." A report of the action is sent to the board, which may modify the executive committee's decision on its own initiative. Should the board decide to reject a favorable recommendation by the executive committee and impose a more severe form of discipline that involves the suspension or revocation of clinical privileges, however, the physician would then be entitled to a hearing (according to the same procedures) before the board enters a final decision.

to the hearing and to examine witnesses. In addition, the CEO appoints a hearing officer, who must be an attorney, to preside over the hearing and to rule on the admissibility of evidence; the hearing officer must not act as a prosecuting officer or as an advocate for the hospital. The bylaws recognize that all members of the hearing panel, as practicing physicians, cannot be present for all panel sessions and expressly provide that their absence will not disqualify them or invalidate the hearing.

The decision of the hearing panel is to be based on the evidence produced at the hearing, whether in the form of oral testimony of witnesses or documentary evidence. The bylaws specifically provide that the evidence may include "any material contained in the hospital's files regarding the [complained-against physician] who requested the hearing so long as this material has been admitted into evidence at the hearing and the [physician] who requested the hearing had the opportunity to comment on and, by other evidence, refute it." The "burden of proof" is established as follows: "[T]he Hearing Panel shall recommend against the [physician] who requested the hearing unless it finds that said [physician] has proved that the recommendation which prompted the hearing was unreasonable, not sustained by the evidence, or otherwise unfounded."

After reaching a decision, the hearing panel is to "render a recommendation, accompanied by a report, which shall contain a concise statement of the reasons justifying the recommendation made...." The report is then forwarded to the executive committee for whatever modification, if any, it may wish to make in its original recommendation. The executive committee's decision on modification is purely discretionary.

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Within fifteen days after the affected physician is notified of final adverse action by the executive committee, the doctor may make a written request for appellate review by the board of directors. If appellate review is not requested within the fifteen-day period, the affected individual is deemed to have accepted the recommendation involved "and it shall thereupon become final and immediately effective." The terms of the bylaws limit the grounds upon which an adverse disciplinary recommendation may be appealed to the following:

[1] there was substantial failure on the part of the Executive Committee or Hearing Panel to comply with the hospital or Medical Staff Bylaws in the conduct of hearings and recommendations based upon hearings so as to deny due process or a fair hearing, or

[2] the recommendation was made arbitrarily, capriciously, or with prejudice; or

[3] the recommendation of the Executive Committee or Hearing Panel was not supported by the evidence.

Under time constraints imposed by the bylaws, the chairman of the board appoints a board review panel (consisting of three or more persons, including board members or "reputable persons outside the hospital") to consider the record upon which the disciplinary recommendation was made. The review panel may accept additional evidence, subject to the same procedural guarantees that apply to hearing panels, and both sides have an opportunity to present arguments. The review

panel then recommends action to the full board.[10]

The board of directors may affirm, modify, or reverse the recommendations of either the appellate review panel or the executive committee, or, in its discretion, refer the matter for further review and, recommendation.[11] When made, the board's ultimate decision is final, immediately effective, and is not subject to further review under the bylaws.

B.

Bryan's disciplinary problems began shortly after he arrived at Holmes in 1976, and they continued throughout his tenure at the Hospital. Indeed, prior to his termination, Bryan was the subject of more than fifty written incident reports involving unprofessional or disruptive behavior, usually complaints regarding Bryan's abusive treatment of nurses, technicians, and even fellow physicians.[12] By December 1987, nurses in the

[10] If the board's review panel recommends action to the board that is contrary to the recommendation of the medical staff, and if a physician's privileges are at Issue, then the matter is first reviewed by a joint conference committee, comprised of members of the board and the medical staff, before the board makes a final decision.

[11] The medical staff bylaw that contains this provision does not indicate to whom the board may "refer the matter for further review."

[12] Some insight into the origins of this behavior came from Bryan himself during his testimony at trial. Shortly after completing his residency, Bryan obtained staff privileges at a Veterans Administration hospital in Miami. There, he explained, he soon learned that the hospital could not fire incompetent nurses and other technicians easily; the most

intensive care unit at Holmes were refusing to care for Bryan's patients on anything but a rotating basis for fear of becoming the object of his volcanic temper. For their part, surgical nurses complained that Bryan's verbal abuse compounded an already stressful environment, precluding them from operating at peak performance.

At trial in this case, numerous employees who had either witnessed or suffered his outbursts described Bryan's temperament; he was characterized as being "brutal" and sharp" with subordinates, as engendering fear in the nursing staff, and as promoting a tense working atmosphere. Bryan admitted both during the Holmes disciplinary process and at trial in federal court that he had a problem with his temper and that his behavior had, at times, been "disruptive" and "unprofessional." He also conceded that the incident reports describing his behavior were not fabrications.

At first, the Hospital and the medical staff attempted to deal with Bryan's behavior informally. Bryan's conduct was the subject of periodic meetings and counseling by the executive committee, the chief of the medical staff, and even the CEO of the hospital. The Hospital repeatedly warned Bryan that his confrontations with staff members could not be tolerated and insisted that he correct his disruptive behavior. In 1985, Bryan agreed to take a voluntary leave of absence and to seek counseling, first with his priest and then with a psychiatrist (who prescribed a number of medications) to control his

effective way to avoid working with nurses he viewed as incompetent or inefficient, he discovered, was to insult them until they refused to participate in operations involving his patients.

temper.

The incidents continued unabated, however, over the next three years, and Hospital officials gradually began to take a more active approach in dealing with the problem. In August 1987, a group of three Holmes officials--the Hospital's CEO, the chief of the medical staff, and the chairman of the department of surgery--advised Bryan that he would be brought before the executive committee for consideration of formal disciplinary action if further incidents occurred. Following additional incident reports detailing a continued behavioral pattern, the executive committee appointed an ad hoc committee "to investigate Dr. Bryan's long term pattern of behavior and look into rehabilitative possibilities and make a recommendation to the Executive Committee." In March, the ad hoc committee recommended that any future problems be the subject of graduated suspensions, beginning with a one-week suspension for the next significant incident. The executive committee agreed to this proposal and informed Bryan in writing of its decision that any further incidents would result in disciplinary action of increasing severity. According to the minutes from the executive committee's March 14, 1988, meeting, "[tlhe Committee felt that such specific guidelines would be an appropriate mechanism to help Dr. Bryan improve his behavior." Bryan did not contest this action.

In April 1988, Just one month after the executive committee's warning concerning graduated discipline, Bryan had an angry exchange with two anesthesiologists when an operation began three minutes behind schedule. When the anesthesiologists attempted to explain why they were taking a few minutes to reexamine the patient's medical records before

administering the anesthesia to the patient on the operating table, Bryan told them that he "didn't give a damn about incompetent people's excuses." According to the anesthesiologists, he then launched into a tirade of insults in loud and angry tones in front of the still-conscious patient.

The executive committee recommended a one-week suspension as a result of the incident with the anesthesiologists; Bryan again accepted the punishment without objection. Yet Bryan's problems with his colleagues continued. In October 1988, for example, Bryan falsely reported to a nurse supervisor that one of her patients had just hanged himself in his room; in fact, the patient was fine. At trial, Bryan explained that he had intended the episode as a "joke" to teach the nurse "responsibility." After additional incidents during the fail of 1988, the executive committee met to consider disciplinary action. Bryan was invited to this meeting, but he did not appear because, due to a miscommunication, he was waiting in his office to be called. The executive committee reviewed the recent incident reports and, concluding that they included at least two new significant episodes, recommended a four-week suspension.[13]

At this point, Bryan for the first time invoked his procedural rights under the bylaws, requesting that a peer review hearing panel evaluate the executive committee's recommendation. Bryan was represented by counsel at the proceedings, over which Dr. Dale Ryon presided. The Ryon panel concluded

[13] Under the bylaws, Bryan's presence was not required at this stage of the proceedings.

that Bryan had in fact done the things alleged and that Bryan's actions were inappropriate. Nevertheless, it recommended that no suspension be imposed. In its report, the panel expressed concern that the subcommittee monitoring Bryan's behavior had not discussed the incident reports with Bryan before making a recommendation to the executive committee, and that the executive committee had recommended a four-week suspension without hearing from Bryan (as a result of the misunderstanding about the meeting). Further, the Ryon panel suggested that the Hospital's incident report system as a whole was flawed because a report might be filed without the affected individual having a contemporaneous opportunity to respond.[14]

After receiving the Ryon panel's report, the executive committee modified its original disciplinary recommendation, reducing the suggested suspension from four weeks to two. Bryan appealed the executive committee's recommendation to the board of directors, which decided that no suspension would be imposed. On October 19, 1989, however, the board advised Bryan by letter that his abusive behavior could no longer be tolerated and that any further incidents of unprofessional behavior would result in the permanent revocation of his staff privileges. Bryan acknowledged the board's conditions by signing this "ultimatum" letter on December 19, 1989. Above his signature, however, Bryan referred the board to his letter of December 13, in which he disputed that his behavior was disruptive and stated that, by signing the board's letter, he was

[14] In response to this criticism, the incident report system at Holmes was changed to ensure that copies of all incident reports would be provided to the subject soon after they were filed.

not waiving his "rights to due process of law or other civil tights as a medical staff member and American citizen."

Despite the board's warning, Bryan was involved in four additional incidents in the first five months of 1990; these four incidents led directly to the termination of Bryan's medical staff privileges. First, surgical technologist Tina Stark filed an incident report stating that, on March 7, Bryan slapped her hands--apparently as a reprimand for a perceived mistake in handling a catheter--while she was assisting him in an operation. On April 9 and 16, 1990, the executive committee held meetings concerning the Stark incident and interviewed the various nurses and physicians who witnessed the events. Given Bryan's past pattern of conduct, the executive committee recommended that Bryan's privileges be suspended for two weeks. Bryan requested a peer review hearing. Before a hearing panel could be appointed, however, Bryan was involved in a second physical incident. On May 16, 1990, while nurse Michael Greene assisted Bryan on an operation, Bryan struck Greene's hands with a surgical instrument; Greene claimed that his hand hurt for several minutes afterwards.

During the same period, Bryan twice ordered the wrong patient prepared for surgery, first in March of 1990 and then in May. On both occasions, the mistake was caught by another physician after the patient had been transferred to the surgical intensive care unit in advance of the operation.

On May 29, 1990, the executive committee convened to

interview the witnesses to the four recent incidents.[15] Bryan presented his version of events to the committee: He attributed what were perceived as slaps to the hands of the nurses as a form of "nonverbal communication" (the use of hand motions by a physician to give directions during surgery) to correct the nurses' mistakes; similarly, although he admitted the misdirections of the patients for surgery, he minimized these mistakes because they were detected in time and no harm had come to the individuals involved. After considering these latest incidents in light of Bryan's history of disruptive behavior and the hospital's varied attempts to correct such behavior--as well as the board's explicit warning a few months before that further unprofessional conduct would result in Bryan's dismissal--the executive committee recommended that Bryan's staff privileges be permanently revoked.

Once again, Bryan requested that a peer review hearing panel be appointed. Chaired by Dr. Joseph Chanda, the panel consisted of seven physicians, none of whom were vascular surgeons.[16] The Chanda panel held four sessions of hearings;

[15] By letter dated May 18, 1990, Dr. Barry Mills, the chief of the medical staff, suspended Bryan's clinical privileges pending an investigation into these matters. This suspension was considered administrative in nature; under the bylaws, Bryan was allowed to continue to care for patients already admitted to the Hospital, but he could not admit any additional patients.

[16] The hearing panel members were appointed by Dr. Mills with the approval of the executive committee. Bryan challenged the initial composition of the panel, alleging bias on the part of Dr. William Broussard, who advised Bryan to seek counseling for his interpersonal problems in 1982. Bryan also contended that the panel should be composed solely of

Bryan was represented by counsel at the proceedings, and he had both the opportunity to cross-examine the witnesses offered by the medical staff and to present witnesses and documentary evidence on his own behalf. A court reporter recorded the testimony at all of the hearing sessions. Two panel members were absent from at least part of the hearings, but Chanda testified at @ that the panel as a whole reviewed the testimony orally at the end of each session and during deliberations and that summarized what had transpired for the absent members.

The Chanda panel heard the testimony of a number of witnesses, including those directly involved in the four most recent incidents. Bryan himself testified as well, explaining that all of his actions at the Hospital had been motivated by his concern for the care of his patients. The panel also considered the earlier incident reports in Bryan's file that had formed the basis for the board's warning to that any additional disruptive behavior would result in the termination of Bryan's privileges.[17]

surgeons. In response to Bryan's objections, Mills selected a new panel member to replace Broussard but did not remove the non-surgeons who had previously been named. As provided by the bylaws, none of the panel members were vascular surgeons (Bryan's direct economic competitors). Bryan did not object to the reconstituted hearing panel.

[17] During the Chanda panel proceedings, the medical staff attempted to introduce all of the prior incident reports involving Bryan's behavior to demonstrate the pattern of misconduct that had led to the board's warning regarding termination of privileges. The hearing officer refused to admit those reports into evidence. On the last day of the proceedings, however, Bryan called Dr. Ryon to testify regarding the earlier incident reports that

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Much of Bryan's defense was focused on a disparate treatment argument. Bryan contended that he had been written up for minor incidents that would have been ignored had they involved any other doctor on the Holmes staff. Bryan also argued that his temper was not disruptive, and that many other physicians at the Hospital had similar or worse temper problems. He further suggested that the disciplinary action was motivated principally by personal animosity on the part of hospital administrators and executive committee members.

After considering the evidence presented, the Chanda panel unanimously found that the most recent incidents, which prompted the executive committee's investigation and disciplinary recommendation, "were amply supported by the record" and violated the admonitions in the board's October 19, 1989, "warning" letter. The panel also concluded that Bryan had demonstrated a pattern of disruptive behavior extending over many years. Because "the hospital behavior of [Bryan was] below acceptable standards and adversely impact[ed] upon patient care and adversely affect[ed] Hospital Staff's ability to deliver quality patient care," the panel rec-

his panel had considered; Bryan attempted to elicit testimony that there was no pattern of inappropriate conduct by Bryan. Because Bryan had brought the earlier incident reports into issue, the Chanda panel asked the hearing officer *sua sponte* to review the reports, which he allowed at the last session of the hearings. Although Bryan complained that the reports should not be reviewed at that late stage of the proceedings, he did not formally object, assert a violation of the Hospital's bylaws, or ask to reopen the hearing to present evidence in rebuttal. Several Holmes officials who testified at trial agreed that Bryan could have requested a postponement to prepare a response if he was concerned about these last-minute developments.

ommended that Bryan's clinical privileges be suspended for two years.

After considering the Chanda panel's report, the executive committee stood by its recommendation that Bryan's staff privileges be revoked. Bryan appealed the executive committee's recommendation to the board of the directors; pursuant to the bylaws, the board appointed a board review panel, which also recommended revocation of Bryan's clinical privileges. The full board then considered the three recommendations--the report of the executive committee recommending termination of Bryan's clinical privileges, the report of the Chanda panel recommending that Bryan be suspended for two years, and the report of the board's own review panel recommending termination.[18] In November 1990, the board unanimously voted to terminate Bryan's clinical privileges at Holmes. Members of the executive committee and the board who testified at trial agreed that the

[18] Bryan has repeatedly emphasized that the board members did not themselves read the complete transcript of the Chanda panel proceedings before reaching the decision to terminate Bryan's privileges. Bryan, however, had the opportunity to obtain a copy of the transcript of the hearings so that he could refer to specific portions in presenting his appeal to the board; he did not do so. Nor does the record indicate that he claimed *at the time* that the bylaws required the board to obtain the transcript before taking action concerning his staff privileges. Moreover, the text of the relevant medical staff bylaw provision states only that "[tlhe Hearing Panel shall maintain a record of the hearing by a reporter present to make a record of the hearing or a recording of the proceedings. The cost of such a reporter shall be borne by the hospital." A transcript of the first day of the Chanda panel hearings was prepared at Bryan's request and was available for the board's consideration.

disciplinary action was taken after a reasonable effort to obtain the facts and in the reasonable belief that the severe sanction was imposed on Bryan in furtherance of quality patient care at Holmes.

Throughout the disciplinary process, neither Bryan nor the expert witnesses who testified on his behalf contended that the various incident reports that formed the basis for the disciplinary action were fraudulent fabrications. Indeed, Bryan himself admitted that, in each instance, some sort of interaction occurred between himself and the author of the incident report. Bryan merely disagreed both with the Hospital's judgment concerning the propriety of his conduct and the severity of the sanction imposed.

C.

On December 5, 1990, in the United States District Court for the Middle District of Florida, Bryan filed a complaint on behalf of himself and his professional association against the Hospital, the individual members of its board of directors, members of the medical staff executive committee, and two nurses. The complaint included federal and state antitrust claims as well as state law claims for defamation, negligent supervision of the peer review process (against only the individual members of the board of directors), and breach of contract for failing to follow the medical staff bylaws during the disciplinary process (against the Hospital).[19] The

[19]. The complaint also included the following various ancillary claims: (1) constitutional and civil rights claims under 42 U.S.C. § 1983 (1988); (2) federal contractual claims arising out of the Hospital's participation in

complaint demanded damages and, only with respect to the count of negligent supervision, injunctive relief. The central allegation in the complaint was that the defendants, "individually and in concert, acted in bad faith and with intentional fraud, resulting in the destruction of Dr. Bryan's medical practice."

Beginning with their answer denying liability on all counts, the Hospital and the other defendants consistently claimed immunity from monetary liability for their actions in terminating Bryan's clinical privileges because they were functioning in this matter, individually and collectively, as a professional review body in a peer review process. Later, the defendants filed motions for summary judgment, contending, *inter alia* that they were immune from Bryan's suit for damages under HCQIA, 42 U.S.C. § 11111(a), and under Florida law, Fla.Stat.Ann. § 395.0193(5).[20]

the Medicare program; and (3) claims of "interference with prospective economic advantage" and intentional infliction of emotional distress. These causes of action did not figure prominently in the litigation of this case, and the court disposed of these claims either on summary judgment or by granting a directed verdict in favor of the defendants. Because these claims are not before us on appeal, we do not discuss them further in this opinion.

[20]. For the text of the relevant HCQIA provisions, see *supra* part I. The Florida statute requiring that hospitals institute peer review procedures also provides legal protection to participants. The Florida law provides:

> There shall be no monetary liability on the part of, and no cause of action for damages against, any licensed facility, its governing board or governing board members, peer review panel, medical staff, or disciplinary body, or its agents, investigators, witnesses, employees, or any other person for any action taken without intentional fraud in

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In disposing of the defendants' motions, the district court made the following rulings. First, material issues of fact remained concerning whether the applicable standards for peer review actions had been met; therefore, a jury would have to decide the question of immunity. Second, Bryan lacked standing to pursue antitrust claims for damages under either Florida antitrust law or section 4 of the Clayton Act, 15 U.S.C. § 15(a) (1988),[21] but Bryan could assert a claim for injunctive relief under sections 1 and 2 of the Sherman Act, *Id.* §§ 1, 2 (Supp. IV 1993). The factual issues underpinning Bryan's eligibility for injunctive relief would be submitted to the jury, acting in an advisory role. Third, the record did not support Bryan's negligent supervision claim against the individual members of the board of directors. In sum, the following claims remained for trial: the state law damages claims for breach of contract and defamation, as well as the section 1 and 2 Sherman Act claims as to which the jury's verdict would be advisory.

carrying out the provisions of this section.
Fla.Stat.Ann. § 395.0193(5).

[21] This circuit applies a two-pronged test of antitrust standing: The court must first determine that the plaintiff has suffered "'antitrust injury'" and then decide whether the plaintiff is "an efficient enforcer of the antitrust laws." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1449 (11th Cir.1991). The district court held that Bryan had failed to demonstrate that he was an efficient antitrust enforcer.

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This case was tried before a jury in June 1992.[22] At the close of Bryan's case, the district court directed a verdict in favor of all of the individual defendants on the various counts against them because the evidence was insufficient to support liability. The court concluded, however, that the evidence supported Bryan's claims for breach of contract against the Hospital, and denied the Hospital's motion for a directed verdict because material issues of fact remained concerning the federal and state peer review immunity statutes. The court also found that the evidence supported Bryan's antitrust claims against the Hospital and accordingly submitted those claims to the jury.

While the court's oral jury instructions recited some of the language from the immunity statutes, the court did not explain to the jury that the immunity provisions created a threshold question concerning whether Bryan was entitled to damages at

[22] At trial, as before the Chanda panel, Bryan presented testimony from various expert witnesses explaining that Bryan's actions were proper and did not adversely affect patient care; nothing in the record, they testified, would justify the revocation of Bryan's clinical privileges. This testimony was discounted by the Chanda panel. The experts themselves acknowledged at trial that a pattern of disruptive behavior could become so severe that disciplinary action would be required; on cross-examination, the experts also admitted that they had not examined all of the information considered by the Chanda panel. The Hospital also countered with expert testimony explaining why termination of Bryan's privileges was consistent with sound hospital administration.

Bryan also presented the testimony of witnesses who found fault with the Hospital's peer review procedures, particularly that a transcript of the Chanda panel hearings was not prepared for the board's use and that the Chanda hearing officer had become too inquisitorial in his questioning.

all. Moreover, despite requests by counsel for Holmes, the special verdict form did not include any reference to the federal and state peer review immunity statutes.[23] Regarding the breach of contract claim, the special verdict form simply asked the jury to answer this question: "Did Holmes Regional Medical Center permanently terminate Dr. Bryan's medical staff privileges in violation of its bylaws?" If the jury answered "Yes," the verdict form then directed it to quantify the damages sustained by Bryan as a proximate result of the Hospital's conduct. Similarly, regarding the antitrust claim, the verdict form only asked the jury "[h]as Holmes violated state and federal antitrust laws?"

The jury returned affirmative answers to the verdict form interrogatories regarding whether the Hospital had terminated Bryan in violation of the bylaws and whether this breach proximately caused damages to Bryan; and awarded Bryan $4,181,242 in damages for these violations. The jury also found that the Hospital had violated state and federal antitrust laws, thereby causing harm to Bryan; but the district court denied Bryan's post-trial request for injunctive relief under the antitrust laws, concluding that Bryan's remedy at law was

[23] The following colloquy occurred during the brief charge conference after the court informed counsel of its intended instructions:

> [COUNSEL FOR HOLMES]: [T]he special verdict as read does not include any of the immunity issues. Based on your decision on the directed verdict you've left the decision to the jury and we would respectfully request that the jury be instructed on the immunities.
>
> THE COURT: I think that would be confusing to the jury, that's why I left them out. Of course, you can use that in your argument.

adequate.

The Hospital appeals from the district court's judgment awarding Bryan damages for the termination of his medical staff privileges. Holmes first contends that the district court erred in failing to grant its motion for judgment on the state law damages claim based on immunity from liability under both state and federal laws governing the peer review process. In the alternative, the Hospital argues that a new trial is required because the trial court gave erroneous jury instructions and used an improper special verdict form. Bryan cross-appeals from the portion of the district courts summary judgment order denying the plaintiffs standing to seek damages under federal antitrust law.

III.

A.

[1-3] HCQIA immunity is a question of law for the court to decide and may be resolved whenever the record in a particular case becomes sufficiently developed.[24] Congress

[24] As the House Committee explained:

> The provisions would allow a court to make a determination that the defendant has or has not met the standards specified in section [11112(a)]. The Committee intends that the court could so rule even though other issues in the case remain to be resolved. For example, a court might determine at an early stage of litigation that the defendant has met the [section 11112(a)] standards, even though the plaintiff might be able to demonstrate that the professional review action was otherwise improper. At that point, it would be in order for the court to rule on

clearly intended HCQIA to permit defendants in suits arising out of peer review disciplinary decisions to file motions to resolve the issues concerning immunity from monetary liability as early as possible in the litigation process.[25] As the House Committee explained, "these provisions allow defendants to file motions to resolve the issue of immunity in as expeditious a manner as possible." H.R.Rep. No. 903, at 12, *reprinted in* 1986 U.S.C.C.A.N. at 6394. Several courts have resolved the issue of HCQIA immunity from damages liability on summary judgment. *See, e.g., Harris v. Bellin Memorial Hosp.*, 13 F.3d 1082, 1083 (7th Cir.1994); *Austin*, 979 F.2d at 734-35; *Islami v. Covenant Medical Center, Inc.*, 822 F.Supp. 1361, 1376-77 (N.D.Iowa 1992). Of course, although immunity may be determined at the summary judgment stage, resolution of that issue may be deferred until or after trial if the standards of Rule 56 cannot be satisfied. The substantive standards under

immunity. In such a case, the court could still proceed to determine whether injunctive, declaratory, or other relief would be in order.

H.R.Rep. No. 903, at 12, *reprinted in* 1996 U.S.C.C.A.N. at 6394; *see also Austin*, 979 F.2d at 734 & n. 5.

[25] The American Medical Association, appearing as amicus curiae in the case, urged this position on the court:

> Under the HCQIA, the vast majority of lawsuits challenging peer review proceedings should be dismissed at the summary judgment stage. Suits against peer reviewers should be allowed to go forward only when the plaintiff has rebutted the presumption that the peer review proceeding was reasonable and fair. Any lesser standard would deter physicians from serving as peer reviewers and would therefore undermine the purpose of the HCQIA.

HCQIA, remain the same regardless of the point at which the immunity determination occurs.

[4, 5] In civil rights cases brought under 42 U.S.C. § 1983 (1988), we have held that qualified immunity should not become a part of the jury instruction once the affirmative defense has been denied on a motion for summary judgment; the defense of qualified immunity should be decided by the court and should not be submitted for decision by the jury.[26] We conclude that the same procedure should be followed when considering a defendant's immunity from damages liability under HCQIA. A district court should consider the issue of HCQIA immunity from damages at the summary judgment stage. If it determines that the defendant is not entitled to such

[26] The qualified immunity analysis in suits against government officials under 42 U.S.C. § 1983 provides a useful comparison. Although qualified immunity for government officials is a broader protection than that provided to peer review participants under HCQIA, the proper treatment of the two protections is substantially similar.

In qualified immunity cases, the favored approach is to have the immunity determination made by the court, prior to trial, whenever possible. *See Mitchell v. Forsyth*, 472 U.S. 511, 526, 103 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985) (recognizing, of course, that qualified immunity is "an *immunity from suit* rather than a mere defense to liability [that] is effectively lost if a case is erroneously permitted to go to trial"). When the issue cannot be resolved on summary judgment, we have held that "a jury should seldom, if ever, be instructed on qualified immunity; the availability of a qualified immunity defense is a question of law for the court to determine." *Ansley v. Heinrich*, 925 F.2d 1339, 1341 (11th Cir.1991). Accordingly, "[a]lthough the district court preferably makes this determination before trial, qualified immunity is a legal determination that must be made by the court and may be made either before trial, during trial, or after trial." *Stone v. Peacock*, 968 F.2d 1163, 1165 (11th Cir.1992).

protection, then the merits of the case should be submitted to the jury without reference to the immunity issue. If there are disputed subsidiary issues of fact concerning HCQIA immunity, such as whether the disciplined physician was given adequate notice of the charges and the appropriate opportunity to be heard, the court may ask the jury to resolve the subsidiary factual questions by responding to special interrogatories. *Cf Stone*, 968 P.2d at 1166 (similar framework for section 1983 qualified immunity cases); *see also Islami* 822 F.Supp. at 1378 (following *Stone* framework in HCQIA case). Under no circumstances should the ultimate question of whether the defendant is immune from monetary liability under HCQIA be submitted to the jury.

In this case, we review the district court's denial of the Hospital's motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure.[27] Like the district court in ruling on the motion for judgment, we view all of the evidence in the light most to the non-moving party. It is well established that "[j]udgment as a matter of law after the verdict may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." 5A Moore's Federal Practice ¶ 50.07[2] (1994). Accordingly, "we must independently determine whether the facts and inferences point so

[27] The Hospital had moved for judgment as a matter of law (for a directed verdict) under Rule 50(a) at the close of Bryan's case and again at the close of all the evidence. The court denied both motions, rejecting the Hospital's assertion of immunity from monetary liability under the federal and state statutes. The issue, therefore, was properly preserved for a post-trial motion for judgment.

overwhelmingly in favor of the movant . . . that reasonable people could not arrive at a contrary verdict." *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441, 1448 (11th Cir.1991). Moreover, "[t]he moving party is entitled to a [judgment as a matter of law] if the nonmoving party failed to make a showing on an essential element of his case with respect to which he had the burden of proof." *Smith v. United States*, 894 F.2d 1549, 1552 (11th Cir.1990) (citing *Cetotex Corp. v. Catrett*, 477 U.S. 317, 322-28, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)).

[6] As the Ninth Circuit has explained, the rebuttable presumption of HCQIA section 11112(a) creates an unusual summary judgment standard that can best be expressed as follows: "Might a reasonable jury, viewing the facts in the best light for [the plaintiff], conclude that he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of § 11112(a)?"[28] *Austin*, 979 F.2d at 734. If not, the court should grant the defendant's motion. In a sense, the presumption language in HCQIA means that the plaintiff bears the burden of proving that the peer review process was *not* reasonable. Of course, motions for summary judgment under Rule 56 bear a close relationship to motions for judgment as a matter of law under Rule 50. Courts frequently apply the same standards when ruling on the two motions, although a motion for judgment as a matter of law may be granted although a prior motion for summary judgment

[28]. As the Supreme Court has explained, "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidence burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

raising the same issues had been denied. Therefore, we adopt the Ninth Circuit's statement of the applicable standard in this case as well: "[O]ur inquiry focuses on whether [Bryan] provided sufficient evidence to permit a jury to find that he ha[d] overcome, by a preponderance of the evidence, the presumption that [the Hospital] would reasonably have believed" that it had met the standards of section 11112(a). *Austin*, 979 F.2d at 734.

[7] If a jury returns a verdict awarding damages to a disciplined physician but the evidence at trial conclusively demonstrates that the defendant has satisfied HCQIA standards for peer review procedures (thereby being entitled to immunity from monetary liability), then the court should grant a post-trial judgment as a matter of law under Rule 50(b). We must examine the record in this case to determine whether Bryan satisfied his burden of producing evidence that would allow a reasonable jury to conclude that the Hospital's peer review disciplinary process failed to meet the standards of HCQIA.

B.

[8] Before determining whether the procedural standards for proper peer review proceedings were satisfied in this case, we first note that the events and entities at issue here fall squarely within the definitions of HCQIA's operative terms. The disciplinary action at issue here is the November 1990 decision by the Holmes board of directors to revoke Bryan's staff privileges. The term "professional review action" is defined in HCQIA as follows:

[A]n action or recommendation of a professional review

> body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges . . . of the physician.

42 U.S.C. § 11151(9).[29] The revocation of Bryan's staff privileges therefore qualifies as such a professional review action; the statute seems to contemplate inclusion of the recommendations upon which the board's ultimate decision was based--here, the recommendations of the Chanda panel and the executive committee--within the scope of the relevant conduct.

[9] A "professional review body" is defined as "a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity." *Id.* § 11151(11). Furthermore, the term "health care

[29] While its meaning is generally apparent, the statute does provide the following definition of "professional review activity":

> [A]n activity of a health care entity with respect to an individual physician--
>
> (A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,
>
> (B) to determine the scope or conditions of such privileges or membership, or
>
> (C) to change or modify such privileges or membership.

42 U.S.C. § 11151(10). Again, the termination of Bryan's medical staff privileges clearly falls within HCQIA definition.

entity" includes "a hospital that is licensed to provide health care services by the State in which it is located." *Id.* § 11151(4)(A)(i). The Holmes decisionmakers in Bryan's case fall within those categories. As a result, the Hospital is entitled to immunity from monetary liability under section 11111(a) of HCQIA if the peer review process met the standards set forth in section 11112(a).

C.

[10] As stated above, a professional review action must satisfy the four standards of section 11112(a) in order to qualify for the immunity protections of section 11111(a). We discuss each in turn and conclude that the Hospital's termination of Bryan's clinical privileges met HCQIA requirements.

1.

[11] First, a review of the record makes clear that the decision to terminate Bryan's clinical privileges at Holmes was taken "in the reasonable belief that the action was in the furtherance of quality health care." *Id.* § 11112(a)(1). This prong of the HCQIA immunity test is met if "the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients." H.R.Rep. No. 903, at 10, *reprinted in* 1986 U.S.C.C.A.N. at 6293. The record in this case reveals that the revocation of Bryan's privileges was prompted by the reasonable belief that doing so would promote quality health care. Bryan had exhibited a pattern of unprofessional conduct

over a period of many years, and he was given a series of opportunities to remedy his difficulties in interacting with other staff members. Eventually, the Hospital concluded that, because of his behavior, Bryan's presence in the operating room and in patient rooms was disruptive and interfered with the important work of other employees. Moreover, the board was properly concerned about the circumstances surrounding the misdirection of the two patients to surgery. Accordingly, the Hospital dealt appropriately with the perceived situation in terminating Bryan's privileges.

At trial, Bryan asserted that the members of the board of directors and the executive committee were primarily motivated by personal animosity and not by concern for patient care. He introduced no evidence, however, that such hostility determined the outcome of the peer review process. Moreover, Bryan's "assertions of hostility do not support his position [that the Hospital is not entitled to the HCQIA's protections] because they are irrelevant to the reasonableness standards of § 11112(a). The test is an objective one, so bad faith is immaterial. The real issue is the sufficiency of the basis for the [Hospital's] actions." *Austin*, 979 F.2d at 734. We therefore conclude that Bryan failed to provide sufficient evidence to permit a jury to find that he had overcome, by a preponderance of the evidence, the presumption that the Hospital's disciplinary action was taken in the reasonable belief that it would further quality patient care.

2.

[12] Second, a review of the record reveals that the Holmes board of directors took its action "after a reasonable effort to

obtain the facts of the matter." 42 U.S.C. § 11112(a)(2). The board terminated Bryan's medical staff privileges only after Bryan's conduct had been evaluated by the executive committee, the Chanda peer review panel, and an appellate review panel of board members. Each of those groups submitted reports to the board, which made its decision based upon the documentary record developed during the various peer review proceedings and after Bryan had the opportunity, to make a presentation. Bryan introduced no competent evidence at trial to suggest that the Hospital's efforts to obtain the facts before terminating his staff privileges were not reasonable.

3.

[13] Third, Bryan's staff privileges were revoked only "after adequate notice and hearing procedures [were] afforded to the physician involved or after such other procedures as [were] fair to the physician under the circumstances." *Id.* § 11112(a)(3). As noted above, section 11112(b) sets forth the "safe harbor" conditions that a health care entity must meet regarding adequate notice and hearing. Section 11112(b) provides as follows:

> A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):
>
> (1) Notice of proposed action

The physician has been given notice stating--

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating--

(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is requested on a timely basis under

paragraph (1)(B)--

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)--

(i) before an arbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who am appointed by the entity and are not in direct competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician has the right--

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the

hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing, and

(D) upon completion of the hearing, the physician involved has the right--

(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

Id. § 11112(b).

As the summary of the facts of the case in part II of this opinion reflects, each of these procedural requirements of section 11112(b) was satisfied. Documents introduced at trial indicate that the Hospital complied with the notice requirements and that the hearings were hold in a timely fashion and in accordance with the Hospital's bylaws. Bryan was afforded full rights of representation, cross-examination, and confrontation.

Bryan's principal argument is that the board of directors did not have a transcript of the Chanda panel hearings when it rendered its decision. Yet HCQIA, like the Holmes bylaws, requires only that the Hospital ensure that a record of the proceedings be made; Bryan had the responsibility to request

a complete transcript if he thought the board should have one, and he did not.

It should be noted that section 11112(b) specifically provides that the failure of a review body to meet the enumerated conditions does not, per se, constitute a failure to meet the standards of section 11112(a)(3). Indeed, "[i]f other procedures are followed, but are not precisely of the character spelled out in (section 11112(b)], the test of 'adequacy' may still be met under other prevailing law." H.R.Rep. No. 903, at 10, *reprinted in* 1986 U.S.C.C.A.N. at 6393. Moreover, Bryan made no contemporaneous objections to the manner in which the hearing procedures were conducted; section 11112(b) explicitly provides that compliance with its terms is not required if the physician voluntarily waives them. On the record of this cue, we conclude that no reasonable jury could conclude that the Hospital had not afforded Bryan the adequate procedures.

4.

[14] Finally, there is no question that the board decided to terminate Bryan "in the reasonable belief that the action was warranted by the facts known." 42 U.S.C. § 11112(a)(4). Again, the record reveals that the board certainly had a factual basis for its action. Bryan concedes that the incidents that led to his termination actually occurred; his only argument is that they did not justify the severe sanction he received. HCQIA clearly grants broad discretion to hospital boards with regard to staff privileges decisions. Accordingly, as in all procedural due process cases, the role of federal courts "on review of such actions is not to substitute our judgment for that of the

hospitals governing board or to reweigh the evidence regarding the renewal or termination of medical staff privileges." *Shahawy v. Harrison*, 875 F.2d 1529, 1533 (11th Cir.1989). No reasonable jury could conclude that Bryan had demonstrated, by a preponderance of the evidence, that the Hospital board did not act in the "reasonable belief that the [termination] was warranted by the facts known after reasonable effort to obtain facts" as required by section 11112(a)(4). 42 U.S.C. § 11112(a)(4).

IV.

In this case, a disciplined physician attempted to have a jury revisit the adverse decision of his medical colleagues. This is precisely the type of case that Congress targeted when passing HCQIA: "[T]he intent of [the HCQIA] was not to disturb, but to reinforce, the preexisting reluctance of courts to substitute their judgment on the merits for that of health care professionals and of the governing bodies of hospitals in an area within their expertise." *Mahmoodian v. United Hosp. Ctr., Inc.*, 185 W.Va. 59, 404 S.E.2d 750, 756, *cert denied*, -- U.S. --, 112 S.Ct. 185, 116 L.Ed.2d 146 (1991).

Given that all of the section 11112(a) standards were satisfied, we conclude that the Hospital was entitled to the immunity from damages liability granted by HCQIA in § 11111(a).[30] On the record developed at trial, Bryan could not

[30] Because our holding on this point disposes of all of the claims in the case, we need not reach the question of whether the Hospital was protected from monetary liability under the Florida peer review statute, Fla.Stat.Ann. § 395-0115(5). Bryan has not appealed the district court's refusal to grant

recover the damages awarded by the jury. The district court therefore should have granted the Hospital's post-trial motion for judgment as a matter of law under Rule 50(b). Accordingly, we REVERSE the judgment of the district court denying the Hospital's motion for judgment as a matter of law.

IT IS SO ORDERED.

injunctive relief under the antitrust laws, thus we need not address the merits of the antitrust causes of action.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FLOYD T. BRYAN & FLOYD T.,
BRYAN, M.D., P.A.,

Plaintiffs,

v. CASE NO. 90-0896-CIV-ORL-18

JAMES E. HOLMES REGIONAL,
MEDICAL CENTER a/k/a HOLMES
REGIONAL MEDICAL CENTER, INC.,
& OTHERS,

Defendants.
_____/

ORDER

In this action, plaintiffs allege federal and state claims based on James E. Holmes Regional Medical Center's (HRMC) permanent revocation of Floyd T. Bryan, M.D.'s staff privileges. Defendants filed motions to dismiss and for summary judgment. Plaintiffs filed a response in opposition to defendants' motions. Based on a review of the case file and the relevant law, the court DENIES the motion to dismiss and GRANTS, in part, and DENIES, in part, defendants' motions for summary judgment.

I. FACTS

On January 1, 1978, HRMC advised Dr. Bryan of his

appointment to HRMC's active medical staff. (Means Aff., Ex. 1.) Dr. Bryan practiced general and vascular surgery. The parties do not dispute Dr. Bryan's competence in his field of medicine. From 1978 through 1990, Dr. Bryan verbally corrected staff members for actions that he believed endangered patients' lives and submitted numerous letters to HRMC's administration both criticizing and commending staff members. During this time, defendants Raymond A. Armstrong, M.D.; Michael J. Foley, M.D. and Joseph A. Gurri, M.D. also practiced general and vascular surgery at HRMC. Dr. Foley stopped practicing medicine in 1985. Dr. Armstrong, as Chairman of HRMC's Department of Surgery, oversaw the department and recommended corrective actions. Dr. Foley, as HRMC's Medical Director, investigated and reported incidents of concern. Dr. Gurri, as President of HRMC's Medical Staff from 1988 to 1989, oversaw the departments and recommended corrective actions. The evidence suggests that Drs. Armstrong, Foley and Gurri disliked the greater amount of time and money Dr. Bryan spent on surgery, (Ayers Dep. at 36-40), and an HRMC nurse stated that in her opinion they held grudges against Dr. Bryan because of professional jealousy. (Ayers Dep. at 41, 70-71.)

Between 1978 and 1987, HRMC received approximately twenty-five written complaints and incident reports concerning Dr. Bryan's allegedly disruptive behavior. (Means Aff., Composite Ex. 2.) During that period, the HRMC Executive Committee of the Medical Staff (Executive Committee) advised Dr. Bryan that his behavior was unacceptable and might result in temporary or permanent disciplinary action. Dr. Armstrong and defendants Barry A. Mills, M.D.; Lyle Saltzman, M.D.; Lynn Stoldt, R.N.; and Rita Wheeler, R.N., were voting members and Dr. Foley was a non-voting member of the Executive Committee.

Throughout 1987, HRMC continued to receive incident

reports concerning Dr. Bryan's behavior. (Means Aff., Exs. 5-11.) In March 1988, based on the Executive Committee's recommendations, the vice president of HRMC's medical staff sent Dr. Bryan a letter advising Dr. Bryan that he would be subjected to a graduated disciplinary structure. (Means Aff., Ex. 12.) In April 1988, HRMC received an incident report that Dr. Bryan erupted in "a demeaning and profane tirade" against two anesthesiologists. (Means Aff., Ex. 13.) The record shows that problems existed between Dr. Bryan and the anesthesiologist department which Dr. Saltzman headed. (Sullivan Dep. at 218; Ayers Dep. at 33.) HRMC notified Dr. Bryan of the incident report (Means Aff., Ex. 14.) and Dr. Bryan requested an Executive Committee review of the incident. The Executive Committee recommended a seven-day suspension of Dr. Bryan's privileges for his conduct and HRMC's president notified Dr. Bryan of the suspension and his right to appeal it. (Means Aff., Exs. 15, 16.) Dr. Bryan did not appeal the suspension.

In August 1988, HRMC sent Dr. Bryan notice of two additional incident reports concerning his behavior. (Means Aff., Ex. 19.) On November 21, 1988, HRMC's Board of Directors (Board) approved the Executive Committee's recommendation that the Board reappoint Dr. Bryan to the medical staff for one year as opposed to the two year period that Dr. Bryan received in 1986. (Means Aff., Ex. 21.) Dr. Armstrong and defendants Richard N. Baney, M.D.; Michael V. Gatto; Mrs. James E. Gray, III; Martin W. Isenman, M.D.; Maj. Gen. David M. Jones; Michael F. Maguire; Fred L. McFarlin; John E. Miller, M.D.; Val M. Steele; Russell P. Sullivan, Jr.; and John F. Turner, Jr. were members of the Board.

In December 1988, the Executive Committee recommended a four-week suspension based on Dr. Bryan's continued "disruptive behavior" and an incident involving

"inappropriate" progress notes. (Means Aff., Ex. 22.) Dr. Bryan requested an appeal of the suspension. (Means Aff., Ex. 23.) Before the appeal hearing began, HRMC received three more incident reports concerning Dr. Bryan's conduct and gave Dr. Bryan the opportunity to respond to the reports by written comments to the Executive Committee. (Means Aff., Ex. 24.) In May 1989, Dr. Bryan and the Executive Committee presented testimony to a panel of physicians (1989 Panel). In its report, the 1989 Panel did not condone Dr. Bryan's actions. However, the 1989 Panel concluded that Dr. Bryan had already received sufficient punishment without the four-week suspension and criticized the Executive Committee's failure to follow proper incident report review procedures. (Means Aff., Ex. 25.) After reviewing the 1989 Panel report, the Executive Committee recommended a two-week suspension. (Means Aff., Ex. 26.) Dr. Bryan requested an appeal and an opportunity to present oral argument to a board review panel. Based on the 1989 Panel report and oral arguments, the Board Review Panel recommended that the Board of Directors not impose the temporary suspension. The Board Review Panel recommended instead that the Executive Committee monitor Dr. Bryan's behavior and that the Board send Dr. Bryan notice that further display of unprofessional conduct would result in permanent suspension. (Means Aff., Ex. 28) The Board accepted the Board Review Panel's recommendations and sent Dr. Bryan a letter detailing the Board's position. (Means Aff., Ex. 29.)

In March 1990, HRMC advised Dr. Bryan of two incident reports concerning his behavior. The first report stated that Dr. Bryan slapped a nurse's hand and the second report stated that Dr. Bryan misdirected a patient for surgery. At Dr. Bryan's request, the Executive Committee scheduled a meeting to review the first incident report. (Means Aff., Exs. 33, 34.) At the Executive Committee meeting, Dr. Bryan and

the nursing personnel involved with the report gave conflicting versions of the incident. (Means Aff., Ex. 35.) The Executive Committee called a special meeting for further investigation. At the special meeting, the Executive Committee conducted additional interviews and concluded that the incident was not of great significance. The Executive Committee recommended, however, a two-week suspension of Dr. Bryan's privileges based on his history of disruptive behavior. (Means Aff., Ex. 36.) On April 24, 1990, the president of HRMC notified Dr. Bryan of the two-week suspension and his right to appeal and request a hearing. (Means Aff., Ex. 38.)

Before Dr. Bryan received a hearing on the Executive Committee's action, HRMC received two more incident reports concerning Dr. Bryan's behavior. One report stated that Dr. Bryan struck an operating room nurse with a surgical instrument and the other involved a misdirected patient. The Executive Committee interviewed Dr. Bryan and the staff involved with the incidents. Drs. Gurri, Foley and Armstrong and HRMC's president commented about the long-term problems with Dr. Bryan and the Board's mandate to monitor Dr. Bryan's actions. Based on its finding of an escalation of Dr. Bryan's problems with the hospital staff and concern for patient welfare, the Executive Committee imposed a summary suspension of Dr. Bryan's privileges and recommended a permanent revocation of Dr. Bryan's privileges. (Means Aff., Ex. 41.)

In response, Dr. Bryan requested a hearing by a panel of his peers (1990 Panel). (Means Aff., Ex. 43.) At the 1990 Panel hearing, Dr. Bryan's counsel presented witnesses and evidence and cross-examined HRMC's witnesses. (Means Aff., Composite Ex. 48.) The 1990 Panel deliberated the issue and concluded that the record supported the Executive Committee's recommendations. The 1990 Panel also found that Dr. Bryan had a pattern of disruptive behavior that was

below acceptable standards and adversely affected the hospital staff's ability to deliver quality patient care. Based on their findings, the 1990 Panel recommended that the Board suspend Dr. Bryan's privileges for two years. (Means Aff., Ex. 49.) The Executive Committee reviewed the 1990 Panel's findings but voted not to modify its original recommendations. (Means Aff., Ex. 51.)

At Dr. Bryan's counsel's request, a board review panel heard oral argument and reviewed the 1990 Panel record. (Means Aff., Ex. 52.) The Board Review Panel recommended that the Board adopt the Executive Committee's recommendation of permanent revocation. (Means Aff., Ex. 53.) The Board voted to affirm the Board Review Panel's recommendation and informed Dr. Bryan of its decision. (Means Aff., Ex 55.) The chairman of the Board testified that the Board adopted the Executive Committee's recommendation over that of the 1990 Panel because the Board placed more trust in the Executive Committee's judgment. (Sullivan Depo. at 54-62.) The chairman also stated that he had no knowledge that Dr. Bryan's conduct jeopardized or injured any patient. (Sullivan Dep. at 119.) A nurse testified that other doctors at HRMC lost their tempers with the staff; used non-verbal communications in the operation room, such as striking a nurse with an instrument; and misdirected patients, but was unaware of HRMC revoking any other doctors' privileges for such conduct. (Ayers Dep. 14, 27, 58, 61-62, 71-72.) The nurse also testified that superiors on the nursing staff singled out Dr. Bryan when they instructed members of the nursing staff to write incident reports and document them. (Ayers Dep. at 49-50.)

HRMC's president notified the Division of Medical Quality Assurance of the Department of Professional Regulation of the State of Florida that HRMC had permanently suspended Dr. Bryan's privileges and its reasons for taking

such action. (Means Aff., Ex. 56.) The National Practitioner Data Bank also received the information over Dr. Bryan's objections. (Means Aff., Ex. 57.)

II. LEGAL DISCUSSION

A. *Standards of Review*

1. *Motions to Dismiss.*

For purposes of a motion to dismiss, the court must view the allegations of the complaint in the light most favorable to the plaintiff and consider the allegations of the complaint as true. See *Quality Foods de Centro Am. S.A. v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989, 994-95 (11th Cir. 1983). On a motion to dismiss for lack of subject matter jurisdiction, the plaintiff has the burden of showing that he has properly invoked the court's jurisdiction. *Barton v. City of Eustis*, 415 F. Supp. 1355, 1357 (M.D. Fla. 1976).

2. *Motions for Summary Judgment.*

Summary judgment is authorized if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477

U.S. 317, 323 (1986). In determining whether the moving party has satisfied the burden, all inferences drawn from the underlying facts are considered in a light most favorable to the party opposing the motion, and all reasonable doubts are resolved against the moving party. *Anderson*, 477 U.S. at 255; *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). The non-moving party who bears the burden of proof on the issue at trial must go beyond the pleadings and submit affidavits, depositions, answers to interrogatories, or admissions on file that designate "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)).

B. *Motions to Dismiss*

Defendants Mills, Wheeler, Baney, Gatto, Gray, Isenman, Jones, Maguire, McFarlin, Miller, Steele, Sullivan, and Turner (state-only defendants) are parties to plaintiffs' state claims not their federal claims. The state-only defendants filed motions to dismiss plaintiffs' claims against them alleging no federal pendent party jurisdiction. However, 28 U.S.C.A. § 1367 expressly authorizes the exercise of pendent party jurisdiction in any civil action of which the district courts have original jurisdiction, except diversity jurisdiction, to the extent pendent claims form part of the same case and controversy under Article III of the Constitution. 28 U.S.C.A. § 1367. Plaintiffs commenced this action after § 1367 became effective and their complaint asserts federal jurisdiction based on federal statutes, not diversity of citizenship. The state-only defendants do not claim that plaintiffs' federal and state claims arise out of different controversies. Therefore, pursuant to § 1367, plaintiffs' complaint shows that federal jurisdiction exists for plaintiffs' claims against the state-only defendants.

C. *Motions for Summary Judgment*

1. *Immunity*

In their motions for summary judgment, defendants contend that they are immune from plaintiffs' suit for damages under the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C.A. §§ 11101-11152, and Florida Statutes §§ 395.0115 and 766.101(3)(a). Although plaintiffs do not specifically address the immunity statutes, they point to facts that are relevant to the immunity issue in their opposition to defendants' motions for summary judgment.

(a) *Federal (HCQIA) Immunity.*

HCQIA immunity provides incentive and protection for qualifying professional peer review action bodies and individuals associated with or assisting the professional review action. 42 U.S.C.A. § 11111(a), *Austin v. McNamara*, 731 F. Supp. 934, 939 (C.D. Cal. 1990). To qualify for HCQIA immunity, defendants must demonstrate that their review actions concerning Dr. Bryan complied with the standards set forth in 42 U.S.C.A. § 11112. § 11111(a). To satisfy the § 111112 [*sic*] standards, defendants must show that their review actions were taken (1) in the reasonable belief that their actions were in the furtherance of quality health care, (2) after a reasonable effort to obtain the facts of the matter, (3) after adequate notice and hearing was afforded to Dr. Bryan or after such other procedures as were fair to Dr. Bryan under the circumstances, and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the notice and hearing requirements. § 11112(a). A professional review action is presumed to meet the standards unless the presumption is

rebutted by a preponderance of the evidence. *Id.*

In this action, defendants rely on the holding in *Austin* to support their argument that they satisfied the § 11112 standards. In *Austin*, a medical executive committee summarily suspended a doctor's privileges and a judicial review committee conditionally reinstated his privileges based on evidence that the doctor's treatment of a particular patient was substandard and external evaluations indicated that the doctor's conduct created serious concerns in some areas. *Austin*, 731 F. Supp. at 938-40. The doctor filed an antitrust action against the hospital and committee members alleging the defendants conspired to restrain trade and monopolize the market. *Id.* at 934. The *Austin* court granted the committees immunity because the court found that the committees' actions were reasonably warranted by the facts. *Id.* at 940.

Although defendants correctly point to the similarities between *Austin* and this action, they fail to note the distinctions between the two cases. In this action, defendants rely on evidence that hearing panels gathered facts and provided Dr. Bryan with adequate notice and hearings. Yet, defendants disagreed with the hearing panels' recommendations and imposed more severe disciplinary actions against Dr. Bryan. Thus, unlike the committees in *Austin* which relied on their own fact gathering to make their decisions, defendants in this action reviewed the hearing panels' findings but did not adopt the panels' recommendations. Further, unlike the plaintiff in *Austin* who merely alleged a conspiracy with little factual support, plaintiffs attack defendants' reasons for their actions as pretextual and support their claim with evidence that Dr. Bryan's conduct was not the type of conduct that a hospital ordinarily sanctions by revoking a doctor's privileges and the Board had no evidence before it that Dr. Bryan's conduct placed particular patients in danger. Finally, the court recognizes that permanent revocation of a doctor's privileges

is a more serious sanction than a temporary suspension or a conditional reinstatement of privileges. Based on these findings, the court concludes that a question remains whether Dr. Bryan's conduct reasonably warranted the permanent revocation of his privileges.

(b) *State Immunity.*

Under the Florida immunity statutes, defendants are protected from monetary liability if they acted without intentional fraud. Fla. Stat. Ann. §§ 395.0115(5), 766.101(3)(a). Defendants contend that plaintiffs provide no evidence to substantiate their claims of intentional fraud. The record shows, however, that animosity existed between Dr. Bryan and Drs. Armstrong, Foley, Gurri, and Saltzman; nurses singled out Dr. Bryan for incident reports; defendants disregarded the board review panels' recommendations; Dr. Bryan's conduct was not the type of behavior ordinarily subjected to permanent revocation of privileges; and defendants had no evidence that Dr. Bryan's conduct placed a patient [*sic*]. Viewing this evidence in a light most favorable to plaintiffs, the court finds a genuine issue whether defendants acted without intentional fraud.

2. *Count I: Federal Antitrust Claim*

(a) *Standing.*

In Count I of their complaint, plaintiffs bring a private cause of action under sections 4 and 16 of the Clayton Act, 15 U.S.C.A. §§ 15, 26 (West Supp. 1992) against defendants HRMC, Foley, Armstrong and Gurri (antitrust defendants) alleging violations of sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1, 2. In their motions for summary judgment, the

antitrust defendants challenge plaintiffs' standing under section 4 of the Clayton Act. Plaintiffs did not address the standing issue in their response in opposition to defendants motions for summary judgment.

Standing to bring an antitrust claim is a question of law which the court determines by examining the allegations contained in the complaint. *Todorov v. DCH Healthcare Authority* 921 F.2d 1438, 1448 (11th Cir. 1991). To establish a private right of action under Section 4 of the Clayton Act, the court must determine whether (1) the plaintiff suffered "antitrust injury," and (2) plaintiff is an efficient enforcer of the antitrust laws. *Id.* at 1449. The antitrust defendants allege that plaintiffs fail to satisfy either requirement.

The antitrust defendants claim that plaintiffs lack standing because their complaint asserts that the antitrust defendants' anticompetitive conduct prevents Dr. Bryan from reaping the profits of his share of the market. See *id.* 1450-54 (finding that a doctor lacked standing because the antitrust laws were not intended to permit one person to profit from anticompetitive behavior.). However, because plaintiffs seek competitive profits, *see Id.* at 1452 n. 23 (defining competitive profits as those profits that would be earned when all qualified physicians competed freely), the court finds that their injury derives from some anticompetitive conduct and is the type of injury the antitrust laws were intended to prevent, and thus, qualifies as an antitrust injury. *Contra Robles v. Humana Hosp. Cartersville*, 1992 WL 37642 at *8 (N.D. Ga. 1992) (finding that a doctor failed to allege an antitrust injury, but relying on cases in which courts determined whether the plaintiffs showed an unreasonable restraint on trade as opposed to whether the plaintiffs suffered an antitrust injury).

Even though plaintiffs sufficiently allege an antitrust injury, plaintiffs must also show that they are efficient enforcers of the antitrust laws. To determine whether plaintiffs

are efficient enforcers, the court must look at the directness of the injury, the nature of the injury, the potential for duplicative recovery of damages, and the existence of more direct victims of the alleged antitrust violation who could bring suit. *Todorov*, 921 F.2d at 1450-51. The antitrust defendants contend that patients, insurers, and the government have stronger interests in ensuring that prices and services remain at competitive levels unlike plaintiffs whose interest is in competing. Plaintiffs do not dispute the antitrust defendants' position. Thus, because the antitrust defendants show that more efficient enforcers of the antitrust laws exist, the court finds that plaintiffs lack standing to bring a private action for damages under section 4 of the Clayton Act. *See Robles*, 1992 WL 37641 at *8 (finding that if the defendants are acting anticompetitively and are charging an inflated price or providing inferior services for the same prices; the patients, insurers, and government may bring action to enjoin the defendants' conduct); *see also Todorov*, 921 F.2d at 1455 (finding patients, insurers, and the government constitute a class of persons whose self-interest would motivate them to vindicate the public interest).

Although the antitrust defendants succeed in showing that they are entitled to summary judgment as to plaintiffs' standing to bring an action for damages under section 4 of the Clayton Act, they do not provide grounds for summary judgment as to plaintiffs' standing to bring an action for injunctive relief under section 16 of the Clayton Act. Because courts are less concerned about whether the plaintiff is an efficient enforcer of antitrust laws when the remedy is equitable, *Todorov*, 921 F.2d at 1452; the court's conclusion that plaintiffs lack standing under section 4 because they are not efficient enforcers does not show lack of standing under section 16. Furthermore, because the court finds that plaintiffs sufficiently allege an antitrust injury, plaintiffs' have standing

under section 16. *Cf. id.* at 1454 (holding that the court's finding of no antitrust injury compels the court to conclude that plaintiff has no standing to seek an injunction).

(b) *Conspiracy.*

The antitrust defendants claim that plaintiffs fail to create a genuine issue that a conspiracy existed. To establish a conspiracy, plaintiffs must show that (1) two or more persons (2) conspired to restrain trade or monopolize. *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991); *Todorov*, 921 F.2d. at 1455, 1459. The antitrust defendants argue that HRMC acted unilaterally in its decision to revoke Dr. Bryan's privileges because no conspiracy existed.

Plaintiffs may establish a conspiracy by inferences drawn from the antitrust defendants' behavior but antitrust law limits the range of permissible inferences. *Matsushita*, 475 U.S. at 588; *Todorov*, 921 F.2d at 1456. Further, plaintiffs must show that the inference of conspiracy is reasonable in light of the inferences of independent action. *Matsushita*, 475 U.S. at 588 (holding that plaintiffs bear the burden of presenting evidence that reasonably tends to exclude the possibility that the alleged conspirators acted independently). HRMC claims that it revoked Dr. Bryan's privileges to ensure efficient operation of the hospital, and thus, compete with other hospitals. Because HRMC presents a plausible procompetitive reason for its decision, plaintiffs in this action must satisfy a higher burden of proof. *See Todorov*, 921 F.2d at 1456-58 (finding that a hospital's interest in competing with other hospitals presents a plausible procompetitive reason for its actions, and thus, the plaintiff bears a higher burden of proof).

The antitrust defendants correctly state that plaintiffs'

evidence that doctors in competition with Dr. Bryan recommended that HRMC revoke Dr. Bryan's privileges and that HRMC relied on the doctors' recommendation is insufficient alone to create an inference of conspiracy. See *Todorov*, 921 F.2d at 1458-59. Yet, plaintiffs do not rely solely on the antitrust defendants' opportunity to conspire. Instead, plaintiffs challenge HRMC's reasons for revoking his privileges as pretextual based on evidence that Dr. Bryan's conduct was not the type of conduct that a hospital ordinarily sanctions by revoking a doctor's privileges and the Board had no evidence before it that Dr. Bryan's conduct placed any patient in danger. Because plaintiffs present evidence of pretextual reasons for the antitrust defendants' actions, the court finds that a reasonable jury could find plaintiffs' evidence creates an inference of conspiracy. *See Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810, 822, 827 (11th Cir. 1990) (holding that evidence of pretextual reasons for a decision can show a conspiracy), *cert. denied*, 110 S. Ct. 1960 (1990).

(c) *Monopoly.*

HRMC contends that it is entitled to summary judgment as to plaintiffs' claim under section 2 of the Sherman Act because HRMC does not compete in the same market as Dr. Bryan. HRMC fails to note that plaintiffs allege that HRMC conspired with Drs. Armstrong, Foley and Gurri who were Dr. Bryan's competitors. Accordingly, the court denies HRMC's motion for summary judgment as to plaintiffs' section 2 claim. *See White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 104 (4th Cir. 1987) (implying that one who conspires with a competitor can be held liable as a monopolist in the market); *cf. Beard v. Parkview Hosp.*, 912 F.2d 138, 144 (6th Cir. 1990) (affirming dismissal of claims for monopolization and

attempted monopolization against a defendant hospital because it did not compete with the plaintiff, but not addressing a claim for conspiracy to monopolize); *Bozcar v. Manatee Hosps. & Health Systems, Inc.*, 731 F. Supp. 1042, 1047 (M.D. Fla. 1990) (finding no cause of action for conspiracy to monopolize because the plaintiffs failed to allege that the hospital or the doctors competed in the relevant market).

Defendants Armstrong, Foley and Gurri claim that they are entitled to summary judgment as to plaintiffs' section 2 claim because plaintiffs fail to point to evidence showing a specific intent to monopolize. Defendants Armstrong, Foley and Gurri reason that because they present plausible procompetitive reason for recommending the revocation of Dr. Bryan's privileges, the court cannot infer that they intended to destroy competition or build a monopoly in the relevant market. *See White*, 820 F.2d at 105; *Castelli v. Meadville Medical Ctr.*, 702 F. Supp. 1201, 1208 (W.D. Pa. 1988), *aff'd mem.*, 872 F.2d 411 (3d Cir. 1989). Yet, the court finds that plaintiffs' evidence that the antitrust defendants' legitimate reasons were pretextual, *see supra* section C.2.(b), creates a genuine issue whether defendants Armstrong, Foley and Gurri acted with an intent to monopolize. *Cf. White*, 820 F.2d at 105 (granting summary judgment because plaintiff offered no proof negating legitimate business practices); *Castelli*, 702 F. Supp. at 1208 (granting summary judgment because plaintiff offered no direct or circumstantial evidence of an intent to monopolize).

3. *Count VI: State Antitrust Claim.*

In Count VI, plaintiffs allege that the antitrust defendants violated Florida's antitrust laws. Fla. Stat. ch. 542. Section 542.32 of the Florida Statutes provides authority for construing Florida antitrust laws based on federal courts'

interpretation of comparable federal antitrust statutes. Because Florida's damages provision, closely tracks the language of section 4 of the Clayton Act, the court should find that plaintiffs have no standing to bring a damages claim under Florida antitrust law. *Reitz v. Canon U.S.A., Inc.*, 695 F. Supp. 552, 553 (S.D. Fla. 1988).

4. *Count II: Civil Rights Claim.*

Plaintiffs bring a cause of action under 42 U.S.C. § 1983, alleging that defendants HRMC, Armstrong, Foley, Gurri, Saltzman and Stoldt (civil rights defendants) violated Dr. Bryan's rights to due process and equal protection. Plaintiffs allege that the civil rights defendants acted under the color of state law because (1) HRMC is a non-profit organization operating a general hospital under the laws of Florida, (2) the civil rights defendants receive substantial funds directly or indirectly from the United States government for services rendered to patients eligible under Medicare and Medicaid programs, and thus, are subject to regulation by the United States government under 20 C.F.R. § 405, and (3) HRMC receives substantial federal, state and local tax benefits by virtue of its non-profit status. In their motions for summary judgment, the civil rights defendants claim that plaintiffs' allegations fail to show state action as required by § 1983. Plaintiffs did not respond to the civil rights defendants' arguments.

To establish state action under § 1983, plaintiffs must show that the civil rights defendants' alleged infringement of federal rights is fairly attributable to the state. *Boczar*, 731 F. Supp. at 1045. Courts have found evidence of federal and state funding and tax benefits insufficient to establish state action. *Id.* Further, state regulation does not create state action without evidence that the state coerced or significantly

encouraged the civil rights defendants' actions. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164-66 (1978); *Waters v. St. Francis Hosp., Inc.*, 618 F.2d 1105,1107 (5th Cir. 1980); *Boczar*, 731 F. Supp. at 1045. Because plaintiffs present no evidence that the state compelled the civil rights defendants' actions, the court grants summary judgment in favor of the civil rights defendants on Count II. *See Waters*, 618 F.2d at 1107.

5. *Count III: Federal Contract Claim.*

Plaintiffs allege that HRMC breached a contract with the United States government because it failed to comply with federal medicare regulations as provided in 42 U.S.C. §§ 1395-1395ccc [*sic*] (Medicare Act) and 20 C.F.R. § 405.1023. HRMC claims that the Medicare Act does not entitle plaintiffs to a third-party beneficiary action. To bring a private cause of action, plaintiffs must show either express or implied authority in the statute. *Cort v. Ash*, 422 U.S. 66, 68-69 (1975); *see Goldsmith v. Harding Hosp., Inc.*, 762 F. Supp. 187, 188 (S.D. Ohio 1991) (outlining the factors that a court should consider to determine whether a statute implicitly provides a private cause of action).

Plaintiffs provide no grounds for the court to find express or implicit authority in the Medicare Act for plaintiffs to bring a private cause of action. Moreover, HRMC cites caselaw to support its position that a private remedy is not implicit in the Medicare Act. *Robinson v. Magovern*, 456 F. Supp. 1000, 1001 (W.D.Pa. 1978). In addition to finding no implicit private remedy in the Medicare Act, the *Robinson* court noted that § 1395 provides that "nothing in this subchapter shall be construed to authorize any federal officer or employee to exercise any supervision or control over . . . the selection, tenure, or compensation of any officer or

employee of any institution, agency, or person providing health services." *Id.* Because plaintiffs fail to show that the Medicare Act provides either an express or implicit private cause of action, the court grants summary judgment in favor of HRMC on Count III.

6. *Counts VII: Defamation - Slander.*

Plaintiffs allege that Dr. Armstrong is liable for slander because he knowingly and maliciously published false statements about Dr. Bryan. Plaintiffs further allege that defendants Foley, Gurri, Mills, Saltzman, Stoldt and Wheeler (slander defendants) are liable for Dr Armstrong's slanderous statements. Although plaintiffs do not allege that the slander defendants authorized or published false statements about Dr Bryan, plaintiffs evidently rely on their conspiracy allegations to connect the slander defendants with the alleged statements. In their motions for summary judgment, the slander defendants contend that because plaintiffs fail to show a conspiracy, they fail to establish the slander defendants liability The court finds, however, sufficient evidence to create a genuine issue whether a conspiracy exists, and thus, the slander defendants do not provide sufficient grounds for the court to grant summary judgment on Count VIII.

7. *Count X: Negligence*

Plaintiffs allege that defendants Armstrong, Baney, Gatto, Gray, Isenman, Jones, Maguire, McFarlin, Steele, Sullivan and Turner (Board member defendants) are liable for negligent failure to supervise, manage and advise various HRMC committees. Plaintiffs base their negligence claim on the board member defendants' alleged duty to insure that HRMC's committees followed the Medical Staff Bylaws,

Rules and Regulations with the regard to the review of any physician's clinical privileges. Plaintiffs provide no authority for their claim that the Board member defendants owed a duty to Dr Bryan. Moreover, Florida negligence law indicates that the Board owed a duty only to patients. *See Insinga v. LaBella*, 543 So. 2d 209, 214 (Fla 1989) (finding that a hospital owes a duty to patients to assure the competence of medical staff and personnel through its selection and review process); *see also* Fla. Stat. §§ 395.01115(1) [*sic*] (stating that the legislative intent for establishing peer review procedures is to secure quality medical care to Florida citizens), 766.110(1) (establishing hospital liability for failure to exercise due care in fulfilling statutory duties when such failure is the proximate cause of injury to a patient). Therefore, the court finds that plaintiffs fail to establish an essential element of their negligence action, and thus, grants summary judgment on Count X. *See Tieder v. Little*, 502 So. 2d 923, 925 (Fla. Dist. Ct. App. 1987) (holding that to maintain a negligence cause of action, one element that a plaintiff must prove is a duty to conform to a certain standard of conduct for the protection of others, including the plaintiff), *review denied*, 511 So. 2d 298 (Fla 1987).

III. Conclusion

The court finds that federal jurisdiction exists over the state-only defendants pursuant to 28 U.S.C.A. § 1367, and thus, DENIES the state-only defendants' motions to dismiss (Docs. 48, 50) With regard to the motions for summary judgment, the court finds that the undisputed facts, as well as the reasonable inferences drawn from the facts, do not establish a genuine issue of material fact that would justify bringing plaintiffs' civil rights, federal contract, and negligence claims (Counts II, III, X) to trial. Accordingly, the court

GRANTS partial summary judgment in favor of defendants on Counts II, III and X. The court further finds that plaintiffs lack standing to bring a cause of action for damages but are entitled to a claim for injunctive relief under federal and state antitrust laws. Thus, the court GRANTS summary judgment in favor of defendants as to plaintiffs' claim for damages and DENIES summary judgment on their claim for injunctive relief under state and federal antitrust laws. (Counts I, IV) Because genuine issues of fact exits [*sic*] as to defendants right to protection under federal and state immunity statutes and as to plaintiffs' federal and state antitrust, state contract, interference with prospective economic advantage, intentional infliction of emotional distress and defamation claims (Counts I, IV-IX) the court DENIES defendants' motions for summary judgment as to those claims. (Docs. 44, 46, 48, 50) The court GRANTS plaintiffs' motion to strike affidavits and defendants' motion for leave to file amended affidavits. (Docs. 86, 97)

It is SO ORDERED in Orlando, Florida, this 20th day of May 1992.

/s/ G. Kendall Sharp
G. KENDALL SHARP
United States District Judge

Copies to all counsel of record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FLOYD T. BRYAN &
FLOYD T. BRYAN, M.D., P.A.

Plaintiffs,

v. CASE NO. 90-0896-CIV-ORL-18

JAMES E. HOLMES REGIONAL
MEDICAL CENTER a/k/a HOLMES
REGIONAL MEDICAL CENTER, INC.,
& OTHERS,

Defendants.
_____/

ORDER

This action is before the court on the parties' post-trial motions. Floyd T. Bryan (Bryan) filed motions for injunctive relief, to amend judgment to include injunctive relief, and for attorneys fees. Holmes Regional Medical Center (HRMC) responded to Bryan's motions. HRMC filed motions for judgment as a matter of law on Bryan's contract claim, for judgment as a matter of law on Bryan's antitrust claims, to correct judgment, for new trial, for remittitur, to strike attorneys fees, and to review taxation of costs. Bryan then filed motions to strike HRMC's post-trial motions, HRMC's motion to review taxation of costs, and HRMC's memoranda in support of its motions for judgments as a matter of law. Bryan also responded in opposition to HRMC's post-trial

motions.

I. Facts

Plaintiffs filed a complaint against defendants which asserted various causes of action allegedly arising out of defendants' participation in terminating Bryan's staff privileges at HRMC. Before and during trial, the court ruled in favor of defendants on each of plaintiffs' causes of action except their causes of action for breach of contract and violation of antitrust laws. As to the contract and antitrust claims, the court found that only HRMC is subject to liability. The court further held that plaintiffs did not have standing to claim damages under the antitrust laws but could seek injunctive relief. Although the complaint included a general request for injunctive relief, it did not specify the type of relief plaintiffs sought.

On June 17, 1992, a jury returned a verdict in favor of plaintiffs. The jury found that HRMC breached its contract with plaintiffs. Plaintiffs requested six million dollars in damages, comprised of approximately one million dollars for loss of past earnings and five million dollars for loss of future earnings. HRMC contested Bryan's damages claim. The jury determined that Bryan's damages amounted to approximately four million dollars.

The jury also found that HRMC violated state and federal antitrust laws and that its violation caused Bryan injury. After the jury rendered its verdict, Bryan submitted a motion for injunctive relief which asks the court to (1) require HRMC to retract its reports to the State Medical Board and the National Practitioners Data Bank (NPDB) which were based on HRMC's illegal revocation of Bryan's privileges; (2) require HRMC to obtain from NPDB a complete list of all entities who received information concerning HRMC's

revocation of Bryan's privileges and to mail the retraction mentioned above to the entities on the list; (3) enjoin HRMC, its officers, agents and employees from continuing to publish reports that Bryan struck, slapped, or hit various members of the operating team and that Bryan is a disruptive or unprofessional physician and from publishing or using any other defamatory language that demeans Bryan's conduct while he practiced at HRMC; and (4) retain jurisdiction to enforce the above provisions.

II. Legal Discussion

A. *Injunctive Relief*

Section 16 of the Clayton Act entitles any person to sue for and obtain injunctive relief against threatened loss or damage by a violation of the antitrust laws under traditional equity principles. 15 U.S.C.A. § 26. Traditional equity principles dictate that injunctive relief is warranted in this action if Bryan shows (1) a violation of the antitrust laws and (2) continuing irreparable harm if an injunction is not issued and a lack of an adequate remedy at law. *See Newman v. State of Alabama*, 683 F.2d 1312, 1319 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 476 F.2d 989, 992 (5th Cir. 1973); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (defining the traditional bases for injunctive relief as irreparable jury and inadequate legal remedy). The court must also consider whether the relief requested fulfills the primary purposes of the antitrust laws which courts define as ending illegal conduct, depriving violators of benefits of the conduct, and restoring competition to the marketplace. *See Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.* 729 F.2d 1050, 1059 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984); *Ohio-Sealy*

Mattress Mfg. Co. v. Sealy, Inc., 669 F.2d 490, 495 (7th Cir.), *cert. denied*, 459 U.S. 943 (1982); *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 234-35 (9th Cir. 1976); *see also Weinberger*, 456 U.S. at 320 (recognizing courts' judicial power to enforce statutes in accord with traditional practices, as conditioned by the public interest which Congress seeks to protect).

Bryan does not seek an injunction to prevent HRMC from continuing its practice of revoking staff privileges in violation of the antitrust laws. Instead, Bryan contends that the relief requested is necessary to eliminate the consequences of HRMC's illegal acts and to ensure that they do not recur. Although courts have recognized Bryan's grounds for relief as types of harm subject to antitrust regulations, *see Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969); *Weiss v. York Hosp.*, 745 F.2d 786, 829-30 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985); *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 335 (8th Cir. 1982) (citing *United States v. United States Gypsum Co.*, 340 U.S. 76 (1950)), *rev'd on reh'g on other grounds*, 727 F.2d 692 (8th Cir.), *cert. denied*, 469 U.S. 872 (1984), Bryan must also show that he lacks and adequate remedy at law and a significant threat of injury. *Newman*, 683 F.2d at 1319; *Credit Bureau Reports*, 476 F.2d at 992; *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 380 F. Supp. 441, 443 (S.D.N.Y. 1974).

Bryan claims that the professional reports and HRMC's continuing publications will prevent him from obtaining staff privileges at another health care facility. According to Bryan, because the jury awarded him four million dollars rather than six million dollars in damages, the jury did not consider the damage that the professional reports and HRMC's continuing publications would cause to his ability to resume his practice. Although the jury did not award Bryan the entire amount that he requested, based on Bryan's evidence, approximately one

million dollars of the damages requested by Bryan were allocated to loss of past income, and thus, the jury awarded approximately three million dollars in damages for loss of future income. Bryan presents no evidence while calculating the three million dollars in losses of future income, the jury failed to include losses the professional reports and HRMC's continuing publications would create. Furthermore, at the time the jury submitted its verdict, it was unaware of the injunctive relief that Bryan intended to seek. Accordingly, the court finds that Bryan fails to show that his monetary damages do not compensate him for any injury the professional reports and HRMC's continuing publications may cause to his ability to resume his practice.

Even if the jury award did not include monetary damages for future losses arising out of the professional reports and HRMC's continuing publications, Bryan fails to show a significant threat of injury. As to the professional reports, if HRMC fails to amend its reports, Bryan can dispute the accuracy of the reports and, under the NPDB system, the Secretary of the United States Health and Human Services Department will send an amended report to anyone who received the original report concerning Bryan's conduct at HRMC. *See* 45 C.F.R. § 60.14. As to the alleged threat of defamatory statements, although Bryan submitted evidence that HRMC continues to make statements concerning Bryan's conduct at HRMC, the court found similar pre-trial statements insufficient to support a defamation claim. Thus, Bryan fails to show that HRMC's post-trial conduct constitutes a significant threat of injury in the form of defamation.

Finally, the court recognizes that the Seventh Circuit Court of Appeals affirmed a district court order that granted injunctive relief similar to the relief requested in this action. *See Wilk v. American Medical Ass'n*, 895 F.2d 352, 367-68 (7th Cir.), *cert. denied sub nom. Wilk v. Joint Comm. on*

Accreditation of Hosp., 496 U.S. 927 (1990). However, the Seventh Circuit noted that the district court made no findings on the issue whether the plaintiffs had an adequate remedy at law, and thus, the appellate court refused to address the defendant's untimely and poorly developed claim that the plaintiffs had an adequate remedy at law. *Id.* at 370 n.5. Therefore, the holding in *Wilk* does not change the outcome of this action. Because the court finds that Bryan has an adequate remedy at law, the court denies Bryan's motion for injunctive relief and to amend judgment to include injunctive relief.

B. *Other Post-Trial Motions*

Bryan filed a motion to strike all of HRMC's post-trial motions as untimely because Bryan erroneously believed the [*sic*] July 3, 1992 was not a federal holiday. A review of the recognized federal holidays reveals, however, that when July 4 falls on a Saturday, July 3 is a federal holiday. Therefore, because HRMC filed its post-trial motions within ten days of entry of judgment, excluding weekends and federal holidays and allowing three days for service by mail, the court denies Bryan's motion to strike. *See* Fed. R. Civ. P. 6(a), (c); 50(b); 52(a); 59(b).

As to HRMC's motions for judgments as a matter of law, the court grants HRMC's motion to submit supplemental authority in support of its motions. However, even considering HRMC's supplemental authority, the court finds that HRMC fails to show the absence of a legally sufficient basis for a reasonable jury to find in favor of Bryan, and thus, denies HRMC's motions for judgments as a matter of law. *See* Fed. R. Civ. P. 50 (a), (b). Because the court denies HRMC's motions, the court denies as moot Bryan's motion to strike HRMC's memoranda in support of its motions for exceeding

the twenty-page limit.

HRMC claims that it is entitled to a new trial because the jury verdict is not supported by the weight of evidence and because the court committed prejudicial errors. The court finds, however, HRMC fails to support its claims and thus, denies HRMC's motion for a new trial. *See* Fed. R. Civ. P. 59(a).

In its motion for remittitur, HRMC asks the court to reduce the amount of damages awarded by the jury to reflect the impact of the injunctive relief on Bryan's future losses. Because the court denies Bryan's motion for injunctive relief, the court finds no grounds for reducing the amount of damages, and thus, denies HRMC's motion for remittitur.

HRMC asks the court to correct the final judgment entered in favor of the individual defendants on June 22, 1992 to include the court's dismissal of Count VII against HRMC. HRMC correctly observes that the court's directed verdict on Count VII included dismissing plaintiffs' claim against HRMC. Further, a review of the file shows that neither the final judgment dismissing the action against the individual defendants nor the final judgment against HRMC on Bryan's contract and antitrust claims reflect the court's dismissal of Count VII against HRMC. Bryan argues that the court should not amend the final judgment against the individual defendants because HRMC stands in a different position than the individual defendants. Specifically, Bryan notes that the court dismissed the entire action against the individual defendants but dismissed only Count VII against HRMC. Yet, the court entered the final judgment in favor of the individual defendants to account for plaintiffs' claims that were not submitted to the jury. Because plaintiffs' Count VII against HRMC was not submitted to the jury, the court finds that the dismissal of Count VII against HRMC should be included in the final judgment against the individual defendants, and thus, grants

HRMC's motion to correct judgment.

The court defers ruling on the motions concerning taxation of costs and refers the motions involving attorneys fees to the magistrate judge.

III. Conclusion

Because the court finds that Bryan fails to show that he lacks an adequate remedy at law, the court DENIES his motions for injunctive relief and to amend judgment to reflect injunctive relief. (Docs. 189, 190.) The court finds that HRMC filed its post-trial motions within the time allotted by the Federal Rules of Civil Procedure, and thus DENIES Bryan's motions to strike HRMC's post-trial motions and to strike HRMC's motion to review taxation of costs (Docs. 219, 226.) The court GRANTS HRMC's motion to submit supplemental authority (Doc. 232). The court DENIES HRMC's motions for judgments as a matter of law, new trial, and remittitur, (Docs. 198, 201, 203, 205), and DENIES as moot Bryan's motion to strike HRMC's memoranda in support of its motions for judgments as a matter of law. (Doc. 220.) Because the final judgment disposing of all the claims that were not submitted to the jury fails to reflect that the court dismissed Count VII against HRMC on motion for directed verdict, the court GRANTS HRMC's motion to correct judgment. (Doc. 200.) The court DEFERS ruling on the motions concerning taxation of costs, (Docs. 211, 227), and REFERS the motions involving attorneys fees to the magistrate judge. (Docs. 191, 212, 215.)

It is SO ORDERED in Orlando, Florida, this 27 day of August 1992.

/s/ G. Kendall Sharp
G. KENDALL SHARP
United States District Judge

Copies to all counsel of record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FLOYD T. BRYAN and
FLOYD T. BRYAN, M.D., P.A.,

Plaintiffs,

vs. Case No. 90-896-CIV-ORL-18

JAMES E. HOLMES REGIONAL
MEDICAL CENTER a/k/a HOLMES
REGIONAL MEDICAL CENTER, INC.,
et al.,

Defendants.

_____/

MOTION FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO RULE 50(b)

Defendant JAMES E. HOLMES REGIONAL MEDICAL CENTER a/k/a HOLMES REGIONAL MEDICAL CENTER, INC. ("Holmes"), by and through its undersigned counsel, moves for entry of judgment as a matter of law against the Plaintiff, FLOYD T. BRYAN ("Bryan") pursuant to Rule 50(b), Fed. R. Civ. P. As grounds therefor, the Holmes states:

1. The jury, by special verdict form, found that Holmes breached the provisions of its bylaws, and that Bryan suffered monetary damages in the amount of $4,181,220.00 as a result of such breach. This Court entered judgment on that

special verdict on June 22, 1992.[1] This verdict does not conform to the requirements of law and is not supported by the evidence. If permitted to stand, the verdict jeopardizes the hospital peer review process which both Congress and the Florida Legislature have endorsed by a grant of presumptive immunity to participants therein. This verdict must therefore must be set aside.

2. Courts and juries are not permitted to substitute their judgment for that of a hospital's governing board. Rather, the limited role of the court and the jury in review of hospital staff decisions is to assure that the requirements imposed by the Board are reasonably related to the operation of the hospital and fairly administered. Shahawy v. Harrison, 875 F.2d 1529, 1533 (11th Cir. 1989). The evidence presented at trial conclusively shows that Holmes' decision to terminate Bryan's staff privileges was reasonably related to the orderly and efficient operation of the hospital and treatment of patients, and that the procedures for disciplinary action adopted in Holmes' bylaws were fairly and properly administered. A grant of judgment to Bryan is therefore not supported by law, and is clearly erroneous.

3. The actions taken by Holmes in the proceedings leading to the termination of Bryan's staff privileges were undisputedly part of the peer review process authorized by

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[1] Holmes interprets the Court's June 22, 1992 Judgment on behalf of Bryan to indicate that this Court has reserved ruling on Bryan's antitrust claims. Holmes has accordingly filed a renewed motion for judgment as a matter of law under Rule 50(a), Fed. R. Civ. P., addressing the antitrust claims. If Holmes is in error, and the June 22, 1992 Judgment addresses both the breach of contract and antitrust claims, Holmes requests that the motion regarding the antitrust issues be considered as part of this motion under Rule 50(b), and that Holmes be permitted to exceed the twenty page limit on memorandum of law imposed by Local Rule 3.01.

§395.0115, Fla. Stat. The Florida Legislature has provided a presumptive grant of immunity from any claims for monetary damages to hospitals and physicians participating in the peer review process authorized by §395.0115(5), Fla. Stat., absent a showing of intention fraud by the Hospital. Section 395.0115(5), Fla. Stat.

4. To prove intentional fraud under Florida law, Bryan is required to prove 1) that Holmes created or induced charges against Bryan that were false; 2) that Holmes knew the charges were false; and 3) that Holmes submitted the false charges against Bryan with the intent that they be relied upon by the members of the Medical Executive Committee, the peer review panels, and the Board. Taylor v. Kenco Chemical and Mfg. Corp., 465 So.2d 581, 589 (Fla. 1st D.C.A. 1985); Barrett v. Guesnel, 90 So.2d 706 (Fla. 1956). Bryan has failed to present any competent evidence to show any of these essential elements necessary to prove intentional fraud on the part of Holmes. A grant of judgment to Bryan therefore violates the requirements of §395.0115(5), Fla. Stat., and is clearly erroneous.

5. Congress has granted immunity from any claims for monetary damages to hospitals and physicians participating in the peer review process by enactment of the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C.A. §11101, et seq. The HCQIA provides a presumption of validity to peer review proceedings that must be overcome by the complaining physician. 42 U.S.C.A. §11111(a); Austin v. McNamara, 731 F.Supp. 934, 942 (C.D. Cal. 1990); Fobbs v. Holy Cross Health Systems Corp, 1992 WL 78727 (E.D. Pa. 1992). The evidence produced at trial conclusively establishes that Holmes' actions in the events and proceedings leading to the termination of Bryan's staff privileges complied with all requirements of the HCQIA. A grant of judgment to Bryan therefore violates the requirements of 42 U.S.C.A. § 11111(a),

and is clearly erroneous.

6. There is no permissible basis to distinguish this action from Austin, and the grant of immunity from any liability for monetary damages afforded to the hospital in Austin under the HCQIA should apply equally to Holmes. Any attempt to distinguish this case on the basis that 1) the disciplinary action adopted by Holmes differed from that of the Chanda Panel; 2) Bryan claims that Holmes' stated reasons for terminating his privileges were pretextual; or 3) the disciplinary action taken by Holmes against Bryan was more severe than the actions taken against Dr. Austin, is not supported by the language of the HCQIA, the legislative history or existing case law.

7. Bryan has failed to offer evidence at trial upon which a reasonable jury could determine that Holmes materially breached the provisions of its bylaws. As recognized by this Court in its May 20, 1992 Order granting summary judgment to Holmes on Bryan's claims under 42 U.S.C.A. §1983, Bryan has no right to challenge the "fairness" of the provisions of the bylaws. He is only entitled to sue for material breach of the provisions of the bylaws to which he agreed to be bound upon his appointment to the staff at Holmes. Lawler v. Eugene Wuestoff Memorial Hospital Assn., 497 So.2d 1261 (Fla. 5th DCA 1989).

8. Even if Bryan were able to prove the minor violations of the bylaws which he claimed occurred, such violations could not be the proximate cause of any injury to Bryan. There is no reasonable basis to conclude that the termination of Bryan's staff privileges was caused by anything other than Bryan's disruptive behavior and the legitimate concerns of Holmes and all other participants in the peer review process for Holmes' staff and patients. A grant of judgment to Bryan is therefore clearly erroneous.

9. Due to the twenty (20) page limitation imposed by

the Local Rules, Holmes cannot address all of the issues which would provide support for this Motion. However, failure to present an issue in this Memorandum shall not be considered as a waiver of the issues for appeal purposes. Holmes reserves the right to fully address any issues omitted herein on appeal.

WHEREFORE, Defendant **JAMES E. HOLMES REGIONAL MEDICAL CENTER a/k/a HOLMES REGIONAL MEDICAL CENTER, INC.** requests that this court enter judgment against Plaintiff **FLOYD T. BRYAN** as a matter of law, in accordance with Rule 50(b), Fed. R. Civ. P.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and the memorandum of law in support thereof was furnished by U.S. Mail to George H. Moss, Esq., Post Office Box 3406, Vero Beach, FL 32964-3406; Joseph P. Metzger, Esq., 1616 Forum Place, Suite 300, West Palm Beach, FL 33407-2384; and to Larry Klein, Esq., Suite 503, Flagler Center, 501 South Flagler Drive, West Palm Beach, FL 33401 this 7th day of July, 1992.

/S/ Christopher K. Kay

Christopher K . Kay
Florida Bar No. 0385931
Ronald M. Schirtzer
Florida Bar No. 0501662
FOLEY & LARDNER
111 North Orange Avenue, Suite 1800
Post Office Box 2193
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Attorneys for the Defendant
JAMES E. HOLMES REGIONAL MEDICAL CENTER a/k/a HOLMES REGIONAL MEDICAL CENTER

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-2963

FLOYD T. BRYAN, FLOYD T. BRYAN, M.D., P.A.,

Plaintiffs-Appellees-Cross-Appellants,

versus

JAMES E. HOLMES REGIONAL MEDICAL CENTER, a/k/a Holmes Regional Medical Center, Inc.,

Defendants-Appellant-Cross-Appellee,

RAYMOND A. ARMSTRONG, M.D., Individually and as Chairman, Department of Surgery, HRMC, and as member of the Board of Directors, HRMC, MICHAEL H. FOLEY, M.D., Individually and as Medical Director, HRMC, MICHAEL V. GATTO, Individually and as Member of the Board of Directors, HRMC, JAMES E. GRAY, III, Individually and as Secretary of the Board of Directors, HRMC, JOSEPH A. GURRI, M.D., Individually and as Chief of Medical Staff, HRMC, MARTIN W. ISENMAN, M.D., Individually and as Member of Board of Directors, HRMC, DAVID M. JONES, Maj. Gen., (Retired), Individually and as Treasurer of the Board of Directors, HRMC, MICHAEL F. MAGUIRE, Individually and as Member of the Board of Directors, HRMC,

FRED L. MCFARLIN, Individually and Member of the Board of Directors, HRMC, JOHN E. MILLER, Ph.D., Individually and as Chairman, Executive Committee, HRMC, LYLE SALTZMAN, M.D., Individually and as Member of the Executive Committee, HRMC, VAL M. STEELE, Individually and Member of the Board of Directors, HRMC, LYNN STOLDT, R.N., Individually and Head Operating Nurse, HRMC, RUSSELL P. SULLIVAN, JR., Individually and as Chairman of the Board of Directors, HRMC, JOHN F. TURNER, JR., Individually and First Vice Chairman of Board of Directors, HRMC, RITA WHEELER, R.N., Individually and as Operating Room Supervisor, HRMC,

Defendants.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, DUBINA, Circuit Judge and DYER, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (rule 35), Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ GERALD B. TJOFLAT
CHIEF JUDGE

United States District Court

MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

FLOYD T. BRYAN and
FLOYD T. BRYAN, M.D., P.A.,

v. JUDGMENT IN A CIVIL CASE

JAMES E. HOLMES REGIONAL
MEDICAL CENTER, a/k/a
HOLMES REGIONAL MEDICAL
CENTER, INC. CASE NO: 90-896-Civ-Orl-18

XX **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. the issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff, FLOYD T. BRYAN, recover of the defendant, JAMES E. HOLMES REGIONAL MEDICAL CENTER, a/k/a HOLMES REGIONAL MEDICAL CENTER,

INC. the sum of $4,181,242.00 with interest thereon at the rate of 4.26% as provided by law, and his costs of action.

that the plaintiff, FLOYD T. BRYAN, M.D., P.A., take nothing, that the action be dismissed on the merits.

APPROVED FOR ENTRY

/S/ G. KENDALL SHARP
G. KENDALL SHARP
United States District Judge

June 22, 1992
Date

DAVID L. EDWARDS
Clerk

/S/ Darleen G. Darby
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FLOYD T. BRYAN & FLOYD T. BRYAN, M.D., P.A.

Plaintiffs,

v. CASE NO. 90-0896-CIV-ORL-18

JAMES E. HOLMES REGIONAL MEDICAL CENTER, etc., & OTHERS,

Defendants.
_____/

SPECIAL VERDICT FORM

1. Did Holmes Regional Medical Center permanently terminate Dr. Bryan's medical staff privileges in violation of its by-laws?

Yes _X_ No ___

If your answer to question 1 is no, go to question 4.

2. If your answer to question 1 is yes, did Holmes's conduct proximately cause any injury or damage to Plaintiffs?

Yes _X_ No ___

3. If your answer to question 2 is yes, what is the amount of any actual damages sustained by Plaintiffs as a proximate result of Holmes's conduct?

Floyd T. Bryan: $ 4,181,242.

Floyd T. Bryan, M.D., P.A.: $ 0

4. Has Holmes violated state and federal antitrust laws?

Yes X No ___

If your answer to question 4 is no, date and sign the verdict.

5. If your answer to question 4 is yes, has Holmes's violation of the federal and state antitrust laws been a proximate cause of any injury and/or damages, threatened or actual, to Plaintiffs?

Floyd T. Bryan Yes X No ___

Floyd T. Bryan, M.D., P.A. Yes ___ No X

SO SAY WE ALL this 17 day of June, 1992.

/S/ LELA L. ABRAMS
FOREPERSON

of the situation at the time, they can't control it. And if they're hollering and they're screaming, they're not normally hollering at the nurse or the person in the room, it's the situation at that time that's taking control.

Q. Have you ever in the period of time that you were a nurse at the hospital at Holmes Regional Medical Center seen Dr. Bryan do anything which in your opinion jeopardized the safety of this patients?

A. Never.

Q. Have you ever seen him do anything which in your opinion would justify his losing the right to practice on the staff of Holmes Regional Medical Center?

A. Not to my knowledge, no.

Q. During the period of time that you've known Dr. Bryan, has his behavior changed?

A. Yeah, I think it has in the years.

Q. What's happened to Dr. Bryan other than he's seven or eight years older?
A. I think we have all gotten older and we have all mellowed some.

Q. And when you indicate mellow, does that indicate mellow in relation to his temper?
A. Very much so.

Q. Have you been subjected to temper bouts by other

A. I think I did.

Q. And did you in the hearing hear anything that indicated that Dr. Bryan was, was unable to operate because of bad eyesight?

A. There is a paragraph to that in this letter.

Q. Yes, sir, I know there was in the letter. But did you hear any evidence?

A. No.

Q. And didn't in fact --
A. From witnesses?

Q. Yes, sir, from any witness. Anybody?
A. No.

Q. Or that he had two pending malpractice lawsuits or that his surgical technique or skills were at all in question.
A. On the contrary. I think his surgical skills were always held to the highest.

Q. So during the Ryon panel, that stack that I just showed, to the best of your recollection, did anybody accuse Dr. Bryan of being incompetent or dangerous to his patients?
A. Absolutely not that I recall.

Q. Now, Dr. Teegen, when your committee, after going over I guess the things in this letter that we just discussed, let me hand you number 399, which is

CURRICULUM VITAE

FLOYD TALMADGE BRYAN, M. D.

BIRTHDATE AND PLACE:	May 5, 1939; Henderson, North Carolina
ADDRESS:	521 West River Oaks Drive, Indialantic, Florida, 32903
FAMILY STATUS:	Married; two girls, one grandchild
EDUCATION:	University of North Carolina A.B.(English Literature) 1961
	University of North Carolina School of Medicine M. D. 1966

PROFESSIONAL ACTIVITIES:

1966-67	Surgical Intern, Johns Hopkins Hospital
1967-68	Junior Assistant Resident, Johns Hopkins Hospital
1968-69	Second Year Resident, University of Miami Hospitals (Jackson Memorial amd [*sic*] VA)
1971-72	Third Year Resident, University of Miami Hospitals
1972-73	Chief Resident and Instructor, University of Miami Hospitals

1973-74	Assistant Professor of Surgery, University of Miami School of Medicine
1974-76	Staff Surgeon, U.S. Navy, Naval Regional Medical Center, Great Lakes
1975-76	Clinical Assistant Professor of Surgery Chicago Medical School
1976-90	Staff Surgeon, Holmes Regional Medical Center, Melbourne
1982-85	Secretary, South Brevard Foundation for the Advancement of Medical Care
1988-	Founding Member, Florida Vascular Society
1988-89	Executive Committee, Southern Association for Vascular Surgery
1988-90	Executive Council, Florida Vascular Society
1985-90	Interview Committee, North Florida, American College of Surgeons

FELLOWSHIPS:

1960-61	Fellowship in Research, Department of Pathology, University of North Carolina School of Medicine: Factor VIII Isolation

1963-64	Graduate School, Fellowship in Research, Department of Pathology, University of North Carolina School of Medicine: Phylogenesis of Coagulation
1969-70	Post-graduate course in Cellular and Molecular Biology; Research in vasoactive amines-Bradykinin; University of Miami
1970-71	Medical Unit Laboratory, St. Mary's Hospital, Paddington, Praed St., London, UK: Renovascular Hypertension and Prostaglandins
Jan. 1983	"Mini" Fellowship with Dr. Stanley Crawford, Methodist Hospital, Houston, Texas: Thoracoabdominal Aneurysms

PROFESSIONAL SOCIETIES:

International Society for Cardiovascular Surgery

American College of Surgeons

Southern Association for Vascular Surgery

The Johns Hopkins Surgical Society

Royal Society of Surgeons, Associate

Society of Sigma Xi

Southeastern Surgical Society

Florida Medical Association

Brevard County Medical Society

Jackson Surgical Society

Womack Surgical Society

American Cancer Society

American Heart Association

Association of V. A. Surgeons

Florida Vascular Society,
Founding Member

MILITARY: Commander, MC, USNR, 1974-76

STATE MEDICAL LICENSES:

North Carolina, 1966, #6456

Maryland, 1967 #C11265

Florida, 1973, #19763

HONORS: American Board of Surgery: Special Competency in Vascular Surgery, 1/84, #74

Fellow, American College of Surgeons, 10/78

American Board of Surgery, 10/9/74, #20429

Phi Beta Kappa

Morehead Scholar

Alpha Epsilon Delta

Beta Club - President

Scout - Eagle, God and Country, Order of the Arrow, Vigil

PUBLICATIONS:

1. Bryan, F.T., Ashley, G. and Langdell, R.D.: Studies of Coagulation of blood of the snapping turtle, Fed. Proc. 24" (2), March 1965.

2. Bryan, F.T., Robinson, C., Gilbert, C., and Langdell, R.D.: N-Ethyl maleimide inhibition of Horseshoe Crab hemocyte agglutination, Science, 144: (3622), May 1964.

3. Langdell, R.D., Bryan, F.T., and Gibson, R.: Coagulation of catfish blood, Proc. Soc. Expl. Biol. Med., 118:439, 1965

4. Bryan, F.T., Ryan, J.W., and Niemeyer, R.S.: Bradykininogen synthesis by liver. In: Back and Sicuteri (Eds.), Vasopeptides, Plenum Publishing Company, New York, 1972

5. Bryan, F.T. and Ryan, J.W.: Bradykininogen, Ciencia E. Cultura, Vol. 23, August, 1971

INTERESTS: Family

Surgery

Sailing

Tennis

Fishing

Snorkling

Q. -- as Dr. Bryan?

Does he treat those patients, that is, accept them and operate on them the same way Dr. Bryan does?

A. I don't know. I have had a few cases with Dr. Gurri that were pretty much run of the mill cases, not anything that you would call complicated.

Q. And how about Dr. Armstrong, same question?

A. The same answer. I worked with him on some uncomplicated, fairly straight forward cases.

Q. And then finally to Dr. Bryan, based upon your ability being at the hospital and observing and being there, what type of cases does he take on?

A. Well, I've seen Dr. Bryan take on very difficult cases and very complicated cases, and cases that I guess would be a judgment call as to whether you would take on that case and go to the limits to try and save that patient or try and help that patient. And I think that he, I've observed him use all of his abilities to try and help patients and save patients, and I've seen him do some very good work on some very complicated cases where I've been consulted afterwards.

For example, we had one patient who had a cannon ball go through half of her body.

the question who's working with him today?

A. It was maybe not the question itself; it was the way in which it was said.

Q. I see. And what is disparaging about the question what does he plan on doing today when asking about the kind of surgery that's to be performed?

A. Well, Dr. Bryan was a forerunner in the vascular surgery at Holmes, and he was very innovative with his techniques, and there were a few surgeons who took issue with this.

Q. You indicate -- Do you believe that they're taking issue with this by the fact they're asking what kind of surgery is he going to do today?

A. Yes, yes. Do you understand what I'm saying?

Q. No, ma'am.

A. Okay. Dr. Bryan was one of the first surgeons that did a composite graft. Now, that was part man-made material and part body material. And at that time this was considered very innovative, and it was also an extreme measure, and there were some surgeons who felt that this was not to the benefit of the patient.

Q. Did they tell -- Did those physicians tell you that?

A. Yes.

Q. I see. And who were those physicians?

A. Do you really want me to answer that?

Q. Yes, ma'am.

A. Okay. Dr. Gurri was one of them. Dr. Bryan had a reputation for doing very complex surgeries. He had to use a lot of time. We used very delicate surgery instruments and very delicate suture material, and sometimes it was very hard to see, and it took a great deal of patience to do this. And some doctors, Dr. Gurri among them, did not want to spend that much time to do the procedure.

Q. So Dr. Gurri had a professional opinion that differed from that of Dr. Bryan?

A. Yes.

Q. And yet you call -- Is that a disparaging remark in your opinion?

A. As I said, it was not what was said, it was how it was said.

Q. Is that a difference of opinion in your mind, does that constitute a disparaging remark?
A. Not a difference of opinion, no.

Q. All right. Other than Dr. Gurri, who else in your opinion made disparaging remarks about Dr. Bryan?
A. I'd rather not say.

Q. Well, ma'am, as Mr. Moss indicated, this is a very serious matter.

EXECUTIVE COMMITTEE
February 19, 1988

A special meeting of the Executive Committee was held on Friday, February 19, 1988 in the Executive Board Room.

Those Present Were:

Joseph A. Gurri, M.D.
Barry A. Mills, M.D.
Jack T. Bechtel, M.D.
Lyle Saltzman, M.D.
Scott Z. Seminer, M.D.
C. Mario Oliveira, M.D.
Scott Gettings, M.D.
Raymond A. Armstrong, M.D.
Richard W. Schmid, D.D.S.
Laudie McHenry, M.D.
Paul Miller, M.D.
H. Phillips Stall, M.D.
Michael J. Foley, M.D.

The purpose of the meeting was to review recent incident reports concerning the behavior of Dr. Floyd Bryan.

Dr. Gurri stepped down as chairman and excused himself from all discussion.

Dr. Armstrong reviewed three additional incident reports on Dr. Floyd Bryan since the Executive Committee met in December.

It was noted that the Executive Committee requested reports from Dr. Hunt regarding Dr. Bryan's progress. Dr. Hunt has stated that Dr. Bryan is competent, but does not feel that the

details of the counseling session would be appropriate.

Discussion followed regarding the nature of the incident reports. The committee felt the reports appeared rather vague and somewhat insignificant, but did represent a behavioral pattern. It was noted that Dr. Bryan's competence as a physician has never been in question.

A motion was made to appoint a committee to investigate Dr. Bryan's long term pattern of behavior and look into rehabilitative possibilities and make a recommendation to the Executive Committee. The motion was seconded and passed.

Dr. Gurri will appoint the committee.

MR. SCHIRTZER: Your Honor, if we may, before the court's instructions, in going through the instructions that are being given, we discovered there was no discussion on Section 395 immunities. To simplify the matters, we propose that plaintiffs' instruction number sixty one be given. The defendants are entitled to have that as a matter of law.

THE COURT: Well, I did have that. Let me see the one you have.

MS. CARROLL: I think you gave the federal one. I know you ruled and let them argue in final argument. I don't know. The only time I have said intentional fraud hasn't been defined by the legislature. It's up to you.

We do have an instruction too where you lay out the issue talking about bad faith and with malice. If that takes care of that, I don't know.

Okay. That leaves out the first part of the statute. It talks about the fair review procedures.

The Legislature hasn't defined intentional fraud, so I think that's why you probably let them just argue it in closing.

THE COURT: This is the joint.

MS. CARROLL: That's on the Health Care

2742

Quality Improvement Act.

THE COURT: All right. Well, I'll just give that after fifty eight then.

* * *

unbiased administrative hearings and a fair and meaningful appellate review process during the administrative process in which his medical staff privileges were terminated.

Due process would also require that the acts of the defendant in terminating the plaintiffs' medical staff privileges be neither unreasonable, arbitrary, capricious or malicious.

The first immunity defense is based upon a federal law known as the Health Care Quality Improvement Act which provides that a hospital will not be liable for damages if its actions were taken, one, in a reasonable belief that the action was in furtherance of quality health care; two, that after a reasonable effort to obtain the facts of the matter; three, after adequate notice and hearing procedures are afforded to the physician involved, or after such other procedures as are fair to the physician under the circumstances; and four, that in a reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain such facts and after meeting the requirements of paragraph three.

Hospital by-laws when approved and adopted by the Governing Board become a binding and

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FLOYD T. BRYAN & FLOYD T. BRYAN, M.D., P.A.,

Plaintiffs,

v. **CASE NO. 90-0896-CIV-ORL-18**

JAMES E. HOLMES REGIONAL, MEDICAL CENTER a/k/a HOLMES REGIONAL MEDICAL CENTER, INC., & OTHERS,

Defendant.

_____/

SPECIAL VERDICT FORM

I. Immunity Defenses.

A. Health Care Quality Insurance [*sic*] Act.

1. Is Holmes immune from monetary damages under the provisions of the Health Care Quality Improvement Act?

Yes___ No___

B. § 395.0115, Florida Statutes.

1. Did Holmes terminate Dr. Bryan's privileges as part of investigating and disciplining Dr. Bryan based on the reasonable belief that Dr. Bryan's conduct may have constituted grounds for discipline?

Yes___ No___

Power to control prices or to foreclose competition; and four, the overt acts manifesting such intent.

Section 395 of the Florida Statutes require that hospitals handle staff privilege in conformity with basic fairness and due process. The statute specifically states each licensed facility as a condition of licensure shall provide for peer review of physicians who deliver health care services at the facility. Each facility shall develop written binding procedures by which such peer review shall be conducted. Such procedures shall include, A, a mechanism for choosing the membership of the body or bodies that conduct the paper [*sic*] review, B, the adoption of rules of order for the peer review process, C, fair review of the case with the physician involved, and D, a mechanism to identify and avoid conflict of interest on the part of the peer review panel members.

Section 395 of the Florida Statutes also provides that there shall be no monetary liability or cause of action for damages against participants in the peer review process for any action taken in good faith and without intentional fraud in carrying out the provisions of the statute.

A person in the plaintiff's position may not have his staff privileges terminated unless procedures

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2963

FLOYD T. BRYAN &
FLOYD T. BRYAN, M.D., P.A.,

Plaintiffs/Appellees/Cross-Appellants

v.

JAMES E. HOLMES REGIONAL MEDICAL CENTER,
a/k/a HOLMES REGIONAL MEDICAL CENTER, INC.,

Defendant/Appellant/Cross-Appellee

On Appeal from the United States District Court
For the Middle District of Florida

BRIEF OF AMICI CURIAE THE AMERICAN MEDICAL ASSOCIATION AND THE FLORIDA MEDICAL ASSOCIATION

OF COUNSEL

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ATTORNEYS FOR
AMICI CURIAE
THE AMERICAN MEDICAL ASSOCIATION
AND THE FLORIDA
MEDICAL
ASSOCIATION

June 17, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2963

FLOYD T. BRYAN &
FLOYD T. BRYAN, M.D., P.A.,

Plaintiffs/Appellees/Cross-Appellants

v.

JAMES E. HOLMES REGIONAL MEDICAL CENTER,
a/k/a HOLMES REGIONAL MEDICAL CENTER, INC.,

Defendant/Appellant/Cross-Appellee

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1 and 28.2(b), counsel for amici curiae the American Medical Association and the Florida Medical Association certify the following list of persons or entities that have an interest in the outcome of this case:

1. American Hospital Association
2. American Medical Association
3. Raymond A. Armstrong, M.D.
4. Richard N. Baney, M.D.
5. William A. Bell, Esq.
6. Jack R. Bierig, Esq.
7. Floyd T. Bryan, M.D.
8. Floyd T. Bryan, M.D., P.A.
9. Mrs. Floyd T. Bryan
10. Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A.
11. Jennifer S. Carroll, Esq.
12. The Honorable Donald Paul Dietrich
13. Frederic J. Entin, Esq.
14. Florida Hospital Association
15. Florida Medical Association
16. Michael J. Foley, M.D.
17. Foley & Lardner
18. Michael V. Gatto
19. Mrs. James E. Gray, III
20. Edward B. Hirshfeld, Esq.
21. James E. Holmes Regional Medical Center, a/k/a Holmes Regional Medical Center, Inc.
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*Indicates authorities upon which amici principally rely.

BRIEF OF AMICI CURIAE AMERICAN MEDICAL ASSOCIATION AND FLORIDA MEDICAL ASSOCIATION

The American Medical Association and the Florida Medical Association respectfully submit this brief as amici curiae in support of appellee Floyd Bryan, M.D. This brief is filed with the consent of both parties, pursuant to Rule 29 of the Federal Rules of Appellate Procedure. Copies of the letters establishing the parties' consent are appended to this brief.

INTEREST OF AMICI CURIAE

The American Medical Association ("AMA") and the Florida Medical Association ("FMA") are private, voluntary, nonprofit organizations of physicians. Both associations are dedicated to promoting the science and art of medicine and the improvement of public health. The membership of the AMA exceeds 280,000 physicians, including thousands who practice medicine in states within the Eleventh Circuit. The membership of the FMA consists of approximately 17,000 Florida-licensed physicians, making FHA the largest physician organization in the State of Florida.

The AMA and FMA are dedicated to promoting the public welfare through the maintenance of high professional standards and the provision of quality health care. In pursuit of these goals, the AMA, the FMA, and their members participate in a wide range of peer review programs. Peer review is the process through which the medical profession assesses the competence and conduct of its members. Hospital medical staffs, medical societies, and other physician groups utilize peer review to help assure that physicians provide quality medical care for patients and adhere to appropriate professional standards.

This appeal presents the Court with its first opportunity to address the protections for the peer review process created by the Health Care Quality Improvement Act of 1986, ("HCQIA"), 42 U.S.C. § 11101 et seq. It arises on a record in which a jury found that the defendant Holmes Regional

Medical Center, through its actions, forfeited the immunity conferred by the Act. The record includes facts which support the jury's verdict. The interest of amici is to urge the Court, in affirming the judgment below, to limit its decision to those unique facts but at the same time to make clear that the HCQIA requires a grant of summary judgment to all who engage in fair and reasonable peer review of physicians.

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure and Eleventh Circuit Rule 28-2(3), the AMA and the FMA adopt the following portions of the brief of Plaintiff/ Appellee/Cross-Appellant Floyd T. Bryan:

- Statement of Jurisdiction
- Statement of the Case and Facts
- Standard of Review

STATEMENT OF ISSUES

The AMA and FMA, as amici curiae, will address the following issue:

- Whether the protections for the peer review process embodied in the Health Care Quality Improvement Act, 42 U.S.C. § 11101 et seq., shield the Holmes Regional Medical Center from liability for damages from its termination of the staff privileges of Floyd Bryan, M.D.?

SUMMARY OF ARGUMENT

Congress enacted the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C. § 11101 et seq., to encourage peer review by immunizing participants from most actions for damages by disciplined physicians. Moreover, Congress directed that those who engage in fair peer review not be exposed to protracted litigation that would -- regardless of outcome -- discourage participation in the peer review process. For these reasons, in the vast majority of damage actions based on peer review proceedings, courts should grant summary judgment to defendants.

In this case, a jury concluded that the Holmes Regional Medical Center did not afford Dr. Bryan basic fairness in revoking his staff privileges. After reviewing the record, this Court should conclude that the actions of the Medical Center were so fundamentally unfair that the presumption of immunity under the Health Care Quality Improvement Act has been rebutted and that the judgment of the District Court should therefore be affirmed. However, in affirming that judgment, the Court should make clear that its decision is based on the unique and extraordinary facts of this case and that there is no reason for physicians and hospitals that have conducted peer review in good faith to be concerned about imposition of damages or even involvement in plenary trial proceedings.

I. THE HEALTH CARE QUALITY IMPROVEMENT ACT PROVIDES IMMUNITY FROM DAMAGES FOR PARTICIPANTS IN FAIR AND REASONABLE PEER REVIEW

"The purpose of [the Health Care Quality Improvement Act] is to improve the quality of medical care by encouraging physicians to identify and discipline other physicians who are incompetent or who engage in unprofessional behavior." H.R.

Rep. 903, 99th Cong., 2d Sess. 2, reprinted in 1986 U.S.C.C.A.N. 6384, 6384. To accomplish this goal, HCQIA:

> 1) provides immunity from liability for damages for physicians and organizations that participate in the peer review process, 42 U.S.C. § 11111(a); and
> 2) mandates that the results of peer review proceedings be reported to a national clearinghouse, id. § 11133.

Only the peer review provisions of the statute are at issue here.

Prior to the passage of the HCQIA, the threat of litigation seriously impeded the peer review process. Indeed, Congress expressly found that "[t]he threat of private money damage liability . . . discourage[d] physicians from participating in effective professional peer review." Id. § 11101(4). Congress therefore found an "overriding national need to provide incentives and protection for physicians engaging in effective professional peer review." 42 U.S.C. § 11101(5).

The HCQIA addresses that "overriding national need." It immunizes participants in the peer review process from liability for damages in most private actions if the peer review proceedings meet certain minimum standards. 42 U.S.C. § 11111(a). See Goldsmith v. Harding Hospital, Inc., 762 F. Supp. 187, 188 (S.D. Ohio 1991).[1] The HCQIA creates a presumption that the peer review proceeding conformed to those standards:

> A professional review action shall be presumed

---

[1] The immunity provision does not apply to claims based on violations of federal or state civil rights laws. 42 U.S.C. § 11111(a)(1). Moreover, it does not bar any action brought by the United States or any State. Id.

> to have met the . . . standards necessary for the protection set out [above] unless the presumption is rebutted by a preponderance of the evidence.

42 U.S.C. § 11112(a). Thus, "the burden of proof . . . rests on the plaintiff, not the defendant" peer reviewers, to show that a peer review proceeding failed to conform to the standards of the HCQIA. 132 Cong. Rec. 30767 (Oct. 14, 1986) (statement of Rep. Waxman) (floor leader). See also Smith v. Ricks, 798 F. Supp. 605, 611-12 (N.D. Cal. 1992).[2]

The standards of the HCQIA are designed to promote reasonableness and procedural fairness. They require that a professional review action be taken --

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,

---

[2] In the original draft of the bill, the presumption applied to only one of the four standards that a peer review action must meet to benefit from the HCQIA immunity provisions. Plaintiffs were required to produce clear and convincing evidence to rebut that presumption. See H.R. Rep. 903, 99th Cong., 2d Sess. 10, reprinted in 1986 U.S.C.C.A.N. at 6393. The bill was subsequently amended to apply the presumption to all four standards. Plaintiff's burden was reduced from a clear and convincing showing to a simple preponderance. See 132 Cong. Rec. 30767 (Oct. 14, 1986) (statement of Rep. Waxman).

> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirements of paragraph (3).

Id. § 11112(a). See Patrick v. Burget, 486 U.S. 94, 105-06 n.8 (1988).

In virtually all peer review litigation, the presumption that peer reviewers acted reasonably and fairly should result in early dismissal of the lawsuit. Congress "intend[ed] that [the HCQIA] allow defendants to file motions to resolve the issue of immunity in as expeditious a manner as possible." H.R. Rep. 903, 99th Cong., 2d Sess. 12, reprinted in 1986 U.S.C.C.A.N. at 6394. Accord 132 Cong. Rec. 30767 (statement of Rep. Waxman) . See also Fobbs v. Holy Cross Health System Corp., 789 F. Supp. 1054, 1066 (E.D. Cal. 1992) ("[t]he question of immunity is a matter of law"). E.g., Austin v. McNamara, 979 F. 2d 728 (9th Cir. 1992); Smith v. Ricks, 798 F. Supp. at 611-12.[3]

For example, a plaintiff may not survive a motion to dismiss simply by alleging that procedural irregularities occurred in the peer review process. Although the HCQIA

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[3] See generally Mahmoodian v. United Hospital Center, Inc., 404 S.E.2d 750, 756 (W. Va.), cert. denied, 112 S. Ct. 146 (1991) ("it is evident that the intent of [the HCQIA] was not to disturb, but to reinforce, the preexisting reluctance of courts to substitute their judgment on the merits for that of health care professionals and of the governing bodies of hospitals in an area within their expertise").

sets forth procedural guidelines, see 42 U.S.C. § 11112(b), the statute expressly states that the failure of a review body to meet these guidelines does not violate the statute's procedural fairness standard. Id.[4] Similarly, HCQIA immunity may not be abrogated by a plaintiff's general assertion of hostility on the part of peer reviewers. See Austin v. McNamara, 979 F.2d at 734. Such allegations "are irrelevant to the reasonableness standards of the [statute]. The test is an objective one, so bad faith is immaterial." Id.[5]

Thus, in virtually all cases, physicians who have been disciplined by peer review proceedings will be unable to carry their burden of establishing that the proceedings were unreasonable or procedurally unfair. In most instances, plaintiffs' claims for damages should therefore be dismissed before trial.

II. THIS IS THE RARE CASE IN WHICH THE PLAINTIFF ADDUCED SUFFICIENT EVIDENCE TO REBUT THE STATUTORY PRESUMPTION OF IMMUNITY

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[4] Because "[t]he failure to meet the [procedural] standards [of the HCQIA] . . . creates no presumption with respect to the liability or lack of liability of a health care entity," Congress opined that [s]uch failure would, therefore, be inadmissible in evidence in any litigation between a physician and any person or group engaged in peer review. The only conclusion that follows from a failure to meet those standards is that the entity is not entitled to the immunity conferred under this legislation." H.R. Rep. 903, 99th Cong., 2d Sess. 11, reprinted in 1986 U.S.C.C.A.N. at 6393-94.

[5] Indeed, Congress considered and rejected a "good faith" standard for peer review proceedings so that the immunity test could not be interpreted as requiring an inquiry into the "subjective state of mind of the physicians conducting the professional review action." See H.R. Rep. 903, 99th Cong., 2d Sess. 10, reprinted in 1986 U.S.C.C.A.N. at 6392-93.

The HCQIA does not, however, bestow absolute immunity upon peer review proceedings. A plaintiff who has rebutted the presumption that a professional review action was conducted reasonably and fairly is entitled to proceed to trial. As discussed below, this is the rare case in which a plaintiff has made the requisite showing.

In particular, Dr. Bryan has adduced evidence of one critical fact: The Board of Holmes Regional Medical Center terminated his staff privileges without regard to the most pertinent parts of the record in his case. The Board ignored the work of two separate peer review panels that had heard testimony and examined the evidence against Dr. Bryan. See Brief of Plaintiffs/Appellees/Cross-Appellants at 10-12, 19-20. Instead, the Board acted on the basis of incident reports that had been found to be unreliable by the first panel. Id. The Board did not even consider the record of the hearings conducted by the second panel. Id. at 19-20. That panel had recommended a two-year suspension of Dr. Bryan's staff privileges -- not the permanent termination of privileges imposed by the Board.

Consideration of the evidentiary record is vital to the reasonable and fair disposition of a peer review proceeding. Thus, the Board's action raises questions under two of the four requirements for immunity under the HCQIA. First, the jury could have found that the Board did not act "after a reasonable effort to obtain the facts of the matter," 42 U.S.C. § 11112 (a)(2), because it disciplined Dr. Bryan without regard for the factual record in his case. Second, because the Board ignored the record, the jury could have found that the Board did not act "in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts." § 11112 (a)(4). In these circumstances, this Court should affirm the judgment of the District Court.

At the same time, however, the Court should make clear that this case is highly atypical. The vast majority of

peer review proceedings are both fair and reasonable. See H.R. Rep. 903, 99th Cong., 2d Sess. 10, reprinted in 1986 U.S.C.C.A.N. at 6392-93 (stating that the HCQIA immunity standards will "be met in the overwhelming majority of professional review actions"). The physicians and institutions that participate in these proceedings should be assured that they will not be subjected to prolonged litigation, let alone liability for damages. The Court should not allow the anomalous facts of this case to color its interpretation of the HCQIA and thereby undermine the peer review process generally.

Under the HCQIA, the vast majority of lawsuits challenging peer review proceedings should be dismissed at the summary judgment stage. Suits against peer reviewers should be allowed to go forward only when the plaintiff has rebutted the presumption that the peer review proceeding was reasonable and fair. Any lesser standard would deter physicians from serving as peer reviewers and would thereby undermine the purpose of the HCQIA.

CONCLUSION

In sum, the judgment of the District Court should be affirmed. In deciding this case, however, the Court should take care not to undermine the protections that the HCQIA provides to the vast majority of peer review proceedings.

Respectfully submitted,

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CERTIFICATE OF FILING

I, Jack R. Bierig, an attorney in this matter, hereby certify that I caused copies of the attached brief of amici curiae the American Medical Association and the Florida Medical Association to be filed by Federal Express this 17th day of June, 1993.

/s/ Jack R. Bierig

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his reputation?

A. Yes.

Q. Would you tell the panel about that?

A. I can't remember exactly when I started hearing certain things about Dr. Bryan, but whenever there was some -- or many times when someone was disgruntled in the operating room, his name was mentioned as being the person who started some sort of a furor or made the other person disgruntled.

Q. Were you aware of any enemies that Dr. Bryan had on the medical staff?

A. Well, I think he did have some enemies, yes,

Q. Among who, people in power?

A. I think so.

Q. Chiefs of Staff?

A. No.

Q. Who could you say or would you say?

A. Why don't you name somebody.

Q. Dr. Gurri.

A. Yes.

* * *

in the suspension of privileges of Dr. Bryan?

A. Well, I think that's a tremendous simplification of this entire matter. I don't think we could possibly put it quite like that, I would say that if I had to make a summary of it I would say that the incident reports reflect a pattern of behavior that progressively and gradually, being dealt with by the Executive Committee at multiple meetings with Dr. Bryan upon his review of the matter, multiple counselings and so forth, eventually ended up in the suspension. I don't think one can simply say twenty three incident reports, then suspension. It's a complex matter.

Q. All right. And we'll get into it. Dr. Gurri, as of November 30, 1988, were you doing vascular and general surgery?

A. In 1998 I was.

Q. Were you a competitor of my client, Dr. Floyd Bryan, as of that date, sir?

A. I did not consider myself much of a competitor, but I certainly did do what he did. We had what I felt was very different referral circles and my referral pattern really has not changed much in the point since 1986. He had his circles, I had mine, but I was doing vascular surgery at that time.

Q. And did this Committee, just referring to this document which is Plaintiff's 208, and it's already in evidence, so I won't offer it, but it's the Executive Committee Meeting of February 19, 1988. Where we found later on that Dr. Gurri had appointed these three people to monitor your, quote, behavior, right, and implement the plan reflected in the letter that we talked about of March 17 of 1988; is that right?

A. Yes, sir.

Q. Do you know why they picked two men that you had, why Dr. Gurri picked two people that you had strong disagreements with?

MR. KAY: Objection, calls for speculation.

THE COURT: Sustained.

Q. Let me ask you this, doctor. What was your relationship with Dr. Gurri?

A. The mildest thing I can say is we didn't speak. I think the truth of the matter is the same thing that Dr. Unger told me about 19 --

Q. He'll be up, don't tell them what other people said.

A. Okay. Even if they told it to me?

Q. Well, if they told it to you, you can say it, but don't repeat what other people said.

A. No, Dr. Unger told me, he said Floyd, I want you to know --

MR. KAY: Your Honor, I'm going to object to this because I believe it is offered for the truth of the matter asserted.

THE COURT: Sustained.

Q. What was your relationship with Dr. Gurri?

A. He really hated my guts.

Q. Okay. Do you know why?

MR. KAY: Objection, calls for speculation.

THE COURT: Overruled.

A. Yeah, I think I hurt his ego and I think possibly I hurt his ambitions to be a vascular surgeon.

Q. And this man, did you feel the same way toward him? You said you didn't speak.

A. Well, he had done several things I thought were kind of sleazy or underhanded or not good pool or whatever. Dirty pool. And so I just try to avoid him. I was actually, if I had a choice of having Dr. Gurri practice in town and me be in town again by myself, I would rather have Dr. Gurri because he took some of the load off. I mean, I just could not do it all.

Q. Now, likewise same question with Dr. Armstrong, what type of surgeon is he?

A. He's a general surgeon.

Q. And what does a general surgeon do as it is presently used? The types of operations.
A. Well, hernias, in lay terms, gallbladders, colon operations, large bowel operations, thyroid operations, breast operations.

Q. And do you do that also?
A. I did as a general surgeon, yes.

Q. While you were practicing, did you do general surgery?
A. Yes.

Q. And likewise with Dr. Gurri, what type of surgeon is he?
A. He's a general surgeon and a vascular surgeon.

Q. And you have heard him testify he now doesn't want to do any more vascular surgery?
A. Right. He's graduated towards general surgery.

Q. Now, the other physician whose name has been mentioned is Dr. Shamma.
A. Yes, sir.

Q. Did you approach Dr. Shamma about working with you?
A. Yes, sir.

basketball player.

(Witness excused)

THE COURT: Call your next witness.
MR. MOSS: I would call Dr. Armstrong, Jr., M.D.

THEREUPON,
RAYMOND ALTON ARMSTRONG, JR., M.D.

Having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MOSS:

Q. Good morning, doctor.
A. Good morning.

Q. Would you tell the jury your full name, please.
A. Raymond Alton Armstrong, Junior.

Q. What is your present occupation, doctor?
A. I'm a surgeon.

Q. And do you limit your practice within the field of surgery?
A. Yes, general surgery,

Q. Prior to limiting your practice back in 1990, 1991, did you advertise yourself as a vascular surgeon?
A. I beg your pardon? Would you repeat that?

Q. In 1990 and 1991, did you advertise yourself as a general and vascular surgeon?
A. No.

Q. When did you last advertise yourself as being a vascular surgeon?

A. I never advertised myself as a vascular surgeon.

Q. Did you ever in the yellow pages of the phone book have an ad that said general and vascular surgery?

A. I don't recall that I did. I did do some vascular surgery when I first came to Holmes Medical Center in 1975. I don't recall that I ever advertised that in the yellow pages.

Q. So during the entire time that you have been at Holmes, you have been a general surgeon?

A. I did vascular surgery for a very brief period of time.

Q. All right, sir. Did Dr. Floyd Bryan also do vascular surgery?

A. Dr. Bryan did vascular surgery.

Q. And does he also do general surgery?

A. Yes.

Q. Did he up until his suspension?

A. Yes.

Q. At one point, did you and Dr. Bryan work in the same group?

A. Yes.

Q. When was that?

arrived in the Department of Surgery I gave Dr. Bryan myself.

Q. You gave him yourself?
A. Yes.

Q. No return receipt requested, just you one on one with your old former working mate?

A. Well, that's where the process could stand some improvement. We needed to document the facts and indeed, we made every attempt to improve the method. We tried to be very fair and improve the process, yes, sir.

Q. Gave every benefit of the doubt to the doctor?

A. I feel we did, yes, sir.

Q. And you despise or dislike Dr. Bryan, don't you?
A. Well, which word would you choose?

Q. Which one would you choose, sir?
A. I did say in testimony one time --

Q. Under oath.
A. Under oath, that I didn't particularly like Dr. Bryan.

Q. Is that true?
A. Yes.

Q. Has that been true for some period of time?
A. Often, yes, there are times when I have been very friendly with Dr. Bryan.

This is for the benefit of the jury; is exhibit 67 the incident report that was prepared upon your return from being out of town and discovering that a particular patient on who you had operated no longer had his foot extended and elevated?

A. Yes, sir.

Q. This is the chiropractor we talked about?

A. Yes, sir.

Q. And did you state to the family, quote, I am sorry he was mistreated here. I should have stayed here. We had his left leg nearly straight and now he is contracted. Where is the spandex? It is too late for you nurses to watch him now. I operate 14 hours and then lose the foot. Did you make that statement to the family?

A. I made some of it, yes, sir. I remember apologizing, I was sorry that, that -- I was sorry that this had happened, that somewhere between the intensive care unit where I had left him on auto pilot, and the floor, that the ball had been dropped. I remember stating, well, maybe I should have stayed here, I really felt badly about it. I remember having his leg almost straight and now he's contracted it back up. And I don't, I don't think I said I was sorry that he was mistreated here. And I don't think

I said to the family it's too late for you nurses to watch him now. I may have said that to them later somewhere else. But no, I don't think I said that then.

Q. And did you also indicate in your chart that you apologized to the family on behalf of the hospital?

A. I think I wrote, yes, for the hospital.

Q. For the hospital. And that's because when you returned from being on vacation or being out of town, you naturally assumed that the nurses were the ones that had not followed your orders; isn't that right?

A. No, sir. This was actually, what I actually did, as I said sometime, maybe yesterday, I had operated on this patient, we had him on, when I signed out, he's on auto pilot, everything is written, he's in the ICU, I thought he would still be in the ICU. And if he clotted, that was all that could be done, just lose his leg if the graft clotted.

And I came back, went to the ICU, he wasn't there. And they said he was up on the floor, so I went up on the floor and I saw him bent all up, sitting on his foot again. And I immediately went and got the chart and went through the chart. And I went through the orders backwards, several orders that I went through and the only one I saw was the doctor

A. Yes, sir, there were discussions to that effect.

Q. And who were those people that were encouraging people to write you up?

A. Only two or three were directly named.

MR. KAY: Your Honor, again, may I insert an objection here? I believe that your question was in some sense a compound one. If your --

THE COURT: All right, only if any of the defendants spoke to you, sustain what they said.

Q. Did any of the defendants speak to you directly, sir?

A. Oh, no, sir, they wouldn't.

Q. All right. Let's move along then. Yesterday, doctor, when we were talking about your qualifications, I neglected to have marked for identification your CV, which is our number 116-A. We would offer that at this time, Your Honor.

Now, after this ad hoc committee that you testified never talked to you, nothing happened, there was an incident which occurred with the two anesthesiologists around May of 1987; is that correct? '88 I'm sorry.

A. Yes, sir.

Q. Would you tell the jury, sir, the events that led up to your getting angry at two anesthesiologists

in May of 1988?

A. Yes, sir. One of them was a, the first one, Dr. Saucedo, I had a critically ill young man, 38, 40 or so, with chronic pancreatitis who had acute pancreatitis. I have to explain that a little bit. The pancreas has digestive enzymes in it. And when you get pancreatitis, it swells, the same thing as in mumps. It swells and these enzymes can leak out, not down the ducts into the intestines, but leak out into the body, into the body cavity. And you can literally digest yourself away.

Q. Do what?

A. You can digest yourself from the inside.

Q. How does that happen?

A. Because these digestive enzymes leak out of the pancreas. Leak out the sides, rather than going into the intestine. Anyway, and it can, it can, you know, eat away at blood vessels sort of like a beaver going around a tree I suppose, you know. And then they blow out. And this man was critically ill. He was not in shock at that moment, but he had been shocky and we determined that we were afraid that he was bleeding internally, his blood level was dropping and all that sort of thing. And after, oh, I don't know, he had been posted the day before.

Q. Posted is what?

A. I had mentioned it the day before to be on the operating schedule. You know, if he doesn't get better, we're going to have to operate on him, so you put him on the operating schedule. You can always cancel; it's hard to get on, easy to get off. And so sort of put him on. And I came down the hall getting ready to do him, I heard they called for him, so I went, and in the room there was Dr. Saucedo and two or three other anesthesiologists and they were resuscitating him.

Q. What does that mean?

A. I mean he had arrested, he had vomited and sucked all this stuff into his lungs and he had arrested. And it worked out, usually when somebody's in the intensive care unit and they are sick, the anesthesiologist goes and goes with them to the operating room, in case something happens. And in this case, he had simply just, number one, I don't think any anesthesiologist had ever seen the patient. And they usually do. Nobody had seen the patient, of course, he skipped the holding room because he is too sick, goes directly from the intensive care unit to the operating room itself. And Dr. Saucedo had sent for the patient and when he got there, however long it

took, three minutes or so, patient vomited and aspirated and almost died.

We had to ship him back to the intensive care unit to get him over that, and he kept getting sicker and sicker, and I finally took him back to the operating room and then we did put him under anesthesia and explored, we couldn't find anything that we could fix, and he died.

Q. Did that upset you?

A. Well, two things upset me. He died upset me the most. But the, it really upset me that the anesthesiologist would take a man this desperately ill, maybe he would have died anyway, probably would have, but take a man this desperately ill and send a nurse to go get him. That really bothered me.

Q. That was when in relation to the incident where you got him mad?

A. Oh, a week.

Q. So for a week, you kind of, did you do anything about that first one?

A. No, sir, I didn't know Dr. Saucedo very well, I didn't want to say anything because it was my first encounter with him, and.

Q. Ad hoc committee come into mind?

A. By then I was, you know.

good surgeon and I did good work, and then Mr. Wilford said these incident reports are insignificant, but, I think he used the word insignificant and sheer volume. Those are the two words I remember. And then we talked for awhile and I said, do you want to go over each one? And they said no, it's just sheer volume, there is no need to go over any one. And then Dr. Stall said --

MR. KAY: Objection, Your Honor, that calls for hearsay.

THE COURT: Sustained.

A. Well, that was a suggestion.

Q. Did anyone recommend to you, sir, how to criticize without a direct confrontation?

A. Yes, sir.

Q. And what recommendation was given to you?

A. Dr. Stall recommended that I write letters.

Q. And letters about what?

A. Any kind of dissatisfaction, if I had made anybody angry or if they made me angry or had upset me or just anything. Just write a letter.

Q. And over the years, did you have, or after that period of time, and before, had you had problems with anesthesia?

A. Oh, yes, sir. That was kind of a chronic

problem. It got worse.

Q. It got worse, when?

A. '87, '88.

Q. What problems were you having with anesthesia?

A. I didn't have problems with the individual anesthesiologist; I think everybody's good at some things and better at others. But, and they were all different. As far as the individual anesthesiologists were concerned, the major problems I had was the way they sort of ran their business, if you will. Ostensibly it was a very complex system of checks and balances, which I'm sure on paper looks terrific, but in practice it didn't work. Because the anesthesiologists from what I saw would have somebody see the patient the night before their operation. Unless they came in as an outpatient. Then they would have somebody else see them in the holding room and they'd have a third person see them in the operating room.

That's terrific, you have got three doctors reviewing the chart. The only problem is they didn't talk to each other. I mean, I would talk, sometimes I would catch the first anesthesiologist on the ward and say Mrs. So-and-So has this problem, that problem, we really want to watch out for this or that because I

had interviewed her, I examined her, I knew her, she is my patient. And by the time it got to the third anesthesiologist, he didn't know anything about it. He'd never heard anything about that, you know. And so you didn't know where that was coming at.

The second thing, problem I had is that they would change off a lot between cases, and I can understand on a 12, 14 hour case, can't, you can't have the same doctor all the time, even though you'd like to. But.

Q. Why couldn't you?

A. Well, they work their hours.

Q. Did you change off in the middle of the surgery?

A. No, sir, that wasn't part of the contract, or whatever. But anyway, I really, I thought that, I mean they had to take breaks and things and everybody understands that. I felt very strongly because I think the person who put the patient to sleep ought to be the person to wake them up. Because those drugs are dangerous. And I don't think anybody will ever deny that.

Q. Did you write letters to them about problems that you had?

A. Yes, sir. I had other problems later on, it got so, if I had a case scheduled for 7:30, it routinely

wouldn't start until 8:30. They always had something to do and they were reviewing the chart and they couldn't get this in and they couldn't do that, you know, just sort of dragging your feet.

Q. And so you did write letters about that?

A. Yes, sir.

Q. And did you have problems with the people in the emergency room?

A. Only a couple of problems, yes.

Q. And who was Chief of the emergency room at the time?

A. Dr. Gettings.

Q. And Dr. Scott Gettings?
A. Yes, sir.

Q. What problem did you have or problems with the emergency room?

A. The first one I can remember was the Palm Bay shootout, some guy went berserk with a rifle and in a shopping center, supermarket. And they had all these injured people coming and I think I was the surgeon on call. But anyway, there were a lot of surgeons down there, was during the day. And I picked a lady who looked pretty sick, first pretty sick lady that came in and I said okay, I'll take her. And we did this at the door, as they're coming into the emergency

Not as important. If you're asking how we use this information?

Q. Yes.

A. The way we use this information is principally for resource allocation. You'll see the people at the bottom of this list, two of them at least, are heart surgeons, and you know, our heart program is a very important program to provide to the community. And so as we sit down each year in the budgeting process we determine how much, how many people, how many dollars, what kind of equipment is going to have to go into these various programs. It's important for us to know, in essence, how much we're going to be reimbursed for those services. And sixty percent of our patients are Medicare patients now and so that Medicare program is being cut back on a regular basis. And so for planning purposes it's important internally that we know where to put these resources, where the needs are going to be.

Q. You're not aware, are you, sir, that the American College of Surgeons requires that a surgeon discharge a surgery patient?

A. No, sir, I'm not aware of that.

Q. And if this is misleading then, it's misleading for all of the doctors because if Dr. Armstrong was

you used that for your criteria, you'd end up possibly with at least twenty five or thirty percent of the entire staff, maybe more than that.

Q. Is it of any interest to you as Administrator of the Trustees as the owners of the Hospital as to whether a doctor contributes to the bottom line?

A. No, sir, it's not. We are a Community Hospital, as I said, and as a result we take every patient who comes to the door. We run an Emergency Department twenty four hours a day. We're now going to have two of them, we're going to have one in Palm Bay too, and in essence we treat the people who come to our doorstep. And regardless of who treats them or how they're treated, we do not turn people away. That's part of our mission, that's part of our history and our heritage and we have not ever done that.

Q. Okay, sir. And do you also have an analysis in that same document in front of you as to the profitability or non-profitability for Medicare versus Non-medicare patients? Let me direct your attention to page thirty two.

A. Is this the first thirty two?

Q. I don't know how many thirty twos. Mine is, it's page thirty two. It says Holmes Regional Financial Analysis by specialty physician and payer or

patients for this snapshot, Dr. Armstrong's profit per case, what does that mean, the --

A. Well, that's essentially the difference between the revenues and the expenses after you factor out bad debt, charity, contractual discounts, which is what happens under Medicare.

Q. And we'll just talk about Medicare for Dr. Armstrong was eight hundred and ninety one dollars for this period of time.

A. Yes, sir.

Q. Now, flip the page over on page thirty three, if you'll read it right off?

A. I don't have it. Excuse me. I only had thirty two.

Q. Sorry to flip over the page if you don't have it? [*sic*]

A. This is the same.

Q. That's the same information for a different doctor. Let's take, for example, Dr. Gurri.

A. Yes, sir.

Q. And his profit per case is how much for Medicare patients during October to April '90?

A. Two sixty eight.

Q. All right. And down at the bottom we have physician 1033, Dr. Bryan, and you'll have to go back

and get the next one. I'm sorry. And under Dr. Bryan, this is from the period of October of '89 through April of 1990?

A. Right.

Q. And this is right coincidentally the period of time that he was still allowed to work right before he was suspended, right?

A. Yes, sir.

Q. Okay. And at that period of time, under Dr. Bryan, how much profit was he making per case, according to your figures?

A. On the Medicare patients?

Q. Yes, sir.
A. Was minus eleven hundred dollars.

Q. So the other guys were making you money and Dr. Bryan was losing you money?
A. No, sir.

Q. Why was that? Don't they pay the same for all doctors?

A. No, sir. that's a complete mischaracterization of the evidence and the data. What that means is that most likely, and I'd be guessing, but first of all --

Q. I don't think, Your Honor, that I should want him to guess. If you know, please tell the jury. Don't guess.

HOLMES REGIONAL MEDICAL CENTER, INC.
FINANCIAL ANALYSIS BY SPECIALTY,
PHYSICIAN, AND PAYOR GROUP
INPATIENT - OCTOBER 1989 - APRIL 1990
25 JULY 1990

SPECIALTY SUR	CASES	PROFIT	PROFIT/CASE
ARMSTRONG			
MEDICARE	42	$ 37,407	$ 891
NON-MEDICARE	61	$126,646	$2,076
TOTAL	103	$164,053	$1,593
* * *			
GURRI			
MEDICARE	70	$ 18,781	$ 286
NON-MEDICARE	77	$120,110	$1,560
TOTAL	147	$138,891	$ 945
* * *			
BRYAN			
MEDICARE	59	($ 65,405)	($1,109)
NON-MEDICARE	53	$109,648	$2,069
TOTAL	112	$ 44,243	$ 395
* * *			

the question who's working with him today?

A. It was maybe not the question itself; it was the way in which it was said.

Q. I see. And what is disparaging about the question what does he plan on doing today when asking about the kind of surgery that's to be performed?

A. Well, Dr. Bryan was a forerunner in the vascular surgery at Holmes, and he was very innovative with his techniques, and there were a few surgeons who took issue with this.

Q. You indicate -- Do you believe that they're taking issue with this by the fact they're asking what kind of surgery is he going to do today?

A. Yes, yes. Do you understand what I'm saying?

Q. No, ma'am.

A. Okay. Dr. Bryan was one of the first surgeons that did a composite graft. Now, that was part man-made material and part body material. And at that time this was considered very innovative, and it was also an extreme measure, and there were some surgeons who felt that this was not to the benefit of the patient.

Q. Did they tell -- Did those physicians tell you that?

A. Yes.

Q. I see. And who were those physicians?

A. Do you really want me to answer that?

Q. Yes, ma'am.

A. Okay. Dr. Gurri was one of them. Dr. Bryan had a reputation for doing very complex surgeries. He had to use a lot of time. We used very delicate surgery instruments and very delicate suture material, and sometimes it was very hard to see, and it took a great deal of patience to do this. And some doctors, Dr. Gurri among them, did not want to spend that much time to do the procedure.

Q. So Dr. Gurri had a professional opinion that differed from that of Dr. Bryan?

A. Yes.

Q. And yet you call -- Is that a disparaging remark in your opinion?

A. As I said, it was not what was said, it was how it was said.

Q. Is that a difference of opinion in your mind, does that constitute a disparaging remark?

A. Not a difference of opinion, no.

Q. All right. Other than Dr. Gurri, who else in your opinion made disparaging remarks about Dr. Bryan?

A. I'd rather not say.

Q. Well, ma'am, as Mr. Moss indicated, this is a very serious matter.

to say well, I can't say whether he said this is A, B, and C or this is B, C, and D. It doesn't -- You know, the exact words used aren't that important as if you can remember the content of what he said, I want you to tell us. If you can't remember the content of what he said, then just say so and we'll move on to other questions.

A. Okay.

Q. Can you remember the content of anything Dr. Foley said that leads you to believe that he made disparaging remarks against Dr. Bryan?

A. Not right now I cannot.

Q. Okay. Is there any way you can go back and refresh your recollection? Did you keep any diary of what went on in the hospital on a daily basis?

A. No.

Q. Let me ask you the same question with respect to Dr. --

A. Armstrong.

Q. -- Armstrong, thank you. Can you remember the content of any statements you heard Dr. Armstrong make that can support your opinion that Dr. Armstrong made disparaging remarks about Dr. Bryan?

A. I remember Dr. Armstrong one day making a comment about how many cases Dr. Bryan was doing.

Q. Okay. Was it a comment or question, to the best

EXECUTIVE COMMITTEE

June 5, 1989

There was a called meeting of the Executive Committee on Monday, June 5, 1989 at 12:30 P.M. in the Physicians Dining Room.

Present were:

Joseph A. Gurri, M.D., Chairman
Barry A. Mills, M.D.
Lyle Saltzman, M.D.
Alfred Tortorelli, D.M.D.
James Hunt, M.D.
H. Phillips Stall, M.D.
Raymond A. Armstrong, M.D.
Norman F. Fain, M.D.
Scott Gettings, M.D.
Steven Eggen, M.D.
Pablo Enriquez, M.D.
Harris Cherin, M.D.
Scott Seminer, M.D.
Kirk Gray
Anita Lymburner
Michael D. Means
Elting Storms

Dr. Gurri called the meeting to order. He advised that this would be a single-issue meeting; namely, to discuss the recommendations of the Hearing Panel regarding the suspension of Dr. Floyd Bryan as recommended by the Executive Committee.

Dr. Gurri reminded the Committee that the recommendation of the Hearing Panel is an advisory one - it should be reviewed, the issues addressed and at that point the Committee can either

concur with and forward the recommendation of the Hearing Panel to the Board, modify and clarify their original recommendation according to the recommendations of the Hearing Panel, or go to the Board with their original recommendation. The Hearing Panel's recommendation is not binding upon the Executive Committee in their decision to reach a fair and reasonable recommendation.

Dr. Gurri quoted from the Bylaws, Article VIII entitled, "Hearing and Appeal Procedures", Section 43.9. entitled, "Burden of Proof" which reads as follows: "In all cases in which a hearing is conducted under this Article, after all the evidence has been submitted by both sides, the Hearing Panel shall recommend against the person who requested the hearing unless it finds that said person has proved that the recommendation which prompted the hearing was unreasonable, not sustained by the evidence, or otherwise unfounded."

and I do not remember the specific details, but there were cases that kept surfacing.

Q. So case by case they were not discussed?

A. That's right.

Q. So that it was an impression of the panel that was used to assess these incidents that had occurred prior to that episode?

A. That's right.

Q. Okay. And what was the impression of the panel as to their validity or their inaccuracy?

A. Well, it would appear from that testimony we could obtain that some of them were inaccurate.

Q. Okay.

A. And, therefore, making it open to question as to the validity of any of them.

Q. Okay. I'm going to stop there. Some were inaccurate, some were accurate?

A. Well, some were inaccurate, and it was very difficult to determine the accuracy of any of them.

DR. GOLD: Were the three, just the ones that you had, sufficient evidence to make a determination, out of all those that were provided or discussed?

THE WITNESS: Well, our determination, at least our charge of the determination, was

with any group.

Q. And at the regular meeting, you couldn't resolve what to do with the man; is that fair statement?

A. At the regular meeting or the special meeting, sir?

Q. At the regular meeting.

A. Which meeting is that?

Q. All right, sir, let me direct you to meeting of June 5th, 1989, the Executive Committee, and --

A. If I'm not mistaken, that was the special meeting.

Q. There was a called meeting of the Executive Committee, is that regular or special?
A. That's a special meeting.

Q. Okay, sir. All right, that was a special meeting where Dr. Gurri called the meeting to order.
A. Yes, I don't remember who was the Chairman at that time.

Q. Well, I have got the minutes in front of me. Let me hand you, sir, Defendant's Exhibit 103. Got that in front of you, sir?
A. Yes, sir.

Q. June 5th, starting at the top, Joe Gurri, Chairman, Barry Mills, Lyle Saltzman, Dr. Raymond Armstrong, Scott Gettings, Lymburner, Michael Means,

Elting Storms, Kirk Gray, about 17 people there, right?

A. Yes.

Q. Starts out, does it not, says Dr. Gurri called the meeting to order?

A. Yes.

Q. Single issue, meaning namely to discuss the recommendation of the Hearing Panel?

A. Yes.

Q. Dr. Gurri reminded the Committee that the recommendation of the Hearing Panel is an advisory one and should be reviewed. The issues addressed and at that point the Committee can either concur with and forward the recommendation to the Board, modify and clarify their original recommendation or go to the Board with their original recommendation. The Hearing Panel's recommendation is not binding upon the Executive Committee. Is that your understanding of the Bylaws?

A. Yes, sir.

Q. Dr. Gurri quoted from the Bylaws, hearing and appeal process, section entitled Burden of Proof. That basically says what we have been saying, the Hearing Panel shall recommend against the person who requested the hearing unless it finds that said person

has proved that the recommendations was [*sic*] unreasonable, not sustained by the evidence. Is that correct?

A. Or otherwise informed.

Q. Or otherwise informed. Dr. Ryon came into the Hearing Panel. Dr. Ryon advised the Panel that they could support the recommendation of the Executive Committee except for several technicalities which existed, the failure of the subcommittee to discuss the incident reports, the imposition of a recommendation for a four-week suspension before Dr. Bryan had been allowed to appear before the full Executive Committee to discuss and the conclusion that Dr. Bryan had already sustained significant punishment and the reduction in patient load, expenses incurred, hiring an attorney, I'm sorry, and at the time spent in preparation for an attendance at the Hearing Panel meetings. Did I read that correctly?

A. Yes, sir.

Q. Dr. Ryon was further questioned and down in the middle of that paragraph, Dr. Ryon said it was the opinion of the Panel that the subcommittee mechanism and incident reporting procedure were flawed and that Dr. Bryan was not granted reasonable opportunity or appropriate methods of justifying his behavior. Speaking about that stuff, you remember that

[TEXT OMITTED; AS SUBMITTED BY HOSPITAL]

Dr. Gurri presented an update on Dr. Floyd Bryan's appellate appeal. The Board has made a decision recommending that no suspension of clinical privileges be given at this time, but that a strict monitoring program be set up to answer directly to the Board. If Dr. Bryan has any more serious incidents, his clinical privileges will be terminated (he will be monitored for one year). Every incident report will be reviewed by the Executive Committee with Dr. Bryan and will then be sent to the Board. Dr. Bryan will appear before the Board on October 19 to hear this decision.

Holmes Regional
Healthcare Systems

October 19, 1989

Dr. Floyd T. Bryan
1402 Oak Street
Melbourne, Florida

Dear Dr. Bryan:

The smooth operation of this hospital depends upon a professional and courteous relationship among physicians, nurses and other hospital employees involved in patient care, and hospital management. Your inability to work harmoniously with others has severely disrupted this balance and has diverted an inordinate amount of valuable physician leadership and hospital management time from vital patient care concerns.

The hospital's legal responsibility for the quality of patient care embraces the quality of medical care as well; and the hospital, therefore, has not only the right, but the duty, to establish and enforce standards of competence in physicians who practice in this hospital. The quality of care cannot be divorced from the hospital environment in which it is provided; and, therefore, we must require that all physicians, no less than hospital employees, meet reasonable standards of personal behavior in the hospital. Your disruptive behavior in this hospital, which has included verbal abuse and harassment of nurses and other hospital personnel, is a direct threat to patient care and cannot be tolerated.

Your right to practice at this hospital is only for so long as this Board grants you this privilege. You do not have the right to

act outrageously or in a disruptive manner when using this hospital and its facilities.

Your non-constructive criticism directed to nursing personnel and other employees has intimidated them, undermined their confidence, belittled them, and imputed stupidity, bad motives or incompetency.

Likewise, your negative comments on a patient's chart and to the patient and his family about other physicians, nurses, treatment being given or the operation of the hospital is a course of behavior which is inimical to the proper operation of this hospital and cannot and will not be tolerated.

This Board has both the right and the duty to assure itself that its Medical Staff will meet its standards of both professional performance and personal conduct to ensure the quality of medical care and efficient hospital operation. There is no reason to distinguish between poor clinical performance or poor behavior or conduct.

Nursing personnel and other support people are employed by the hospital to provide patient care and to assist you and other physicians in providing care for your patients. They are, however, employees of the hospital and under the direct supervision of the Administration. If you have a grievance about a nurse or other support person, your grievance should be directed to the Administration who has the ultimate responsibility for hospital personnel. You can be assured that if your grievance is well founded that appropriate action will be taken.

This Board is in agreement with the Medical Staff Executive Committee and finds that you have been guilty of inappropriate and disruptive professional behavior arising out of two

separate incidents involving personnel and patients at this hospital on October 24, 1988 and November 26, 1988.

Your pattern of disruptive behavior is well documented and has persisted over a period of years notwithstanding repeated oral and written warnings, and is clearly beyond acceptable standards of personal behavior and is a threat to patient care.

This Board has given due consideration to the report of the Hearing Panel of the Medical Staff and is cognizant of the many hours that they devoted to this matter, and in deference to them has accepted their recommendation and the recommendation of the Board Review Panel that a temporary suspension of your clinical privileges not be imposed at this time although we believe the disruptive impact of your behavior warrants corrective action.

It is clear to the Board that the need of the hospital to carry out its primary obligation in providing patient care in an atmosphere of calm, order and respect for the dignity of all should not be sacrificed to your disruptive proclivities. Because of your long history of disruptive behavior and the need for the hospital to act, should there be any further disruptive or unacceptable behavior your privileges are subject to revocation. Effective immediately, the following action will be taken.

1. The Executive Staff Medical Committee shall be required to establish and maintain an on-going mechanism to monitor your behavior and actions, including the requirement that you continue to receive professional counseling.

2. All incident reports involving you or your patients shall be reviewed by the Medical Staff Executive Committee

and shall be submitted to this Board for our review through the Joint Conference Committee for a period of not less than twelve (12) months and until such time that no incident reports have been filed for twelve (12) consecutive months.

3. This course of action is being taken based upon receiving your assurances that you will abide by these recommendations and sanctions.

4. You are advised that any further display of unprofessional and disruptive conduct will not be tolerated and will result in the permanent suspension of your clinical privileges at this hospital.

On the enclosed copy of this letter, please acknowledge your agreement to abide by the sanctions and recommendations as set forth herein.

AS PRESENTED BY THE BOARD OF DIRECTORS
HOLMES REGIONAL MEDICAL CENTER

I HEREBY ACKNOWLEDGE RECEIPT OF A COPY OF THIS LETTER AND AGREE TO ABIDE BY THE SANCTIONS AND RECOMMENDATIONS AS SET FORTH HEREIN.

Please see cover letter 13 Dec. (handwritten note from Dr. Bryan)

/s/ F. Bryan
FLOYD T. BRYAN, M.D.

RPS/gkb

Floyd T. Bryan, M.D., P.A.
GENERAL AND VASCULAR SURGERY
1402 OAK STREET
MELBOURNE, FLORIDA 32901
(305) 724-8667

DEC 18 1989

December 13, 1989

Russell Sullivan, Chairman
Board of Directors
Holmes Regional Health Care Systems, Inc.
1350 S. Hickory Street
Melbourne, FL 32901

Dear Mr. Sullivan:

Thank you for providing two copies of your October 19 letter. It was most convenient. Enclosed find one signed copy.

I must firmly reiterate my position that I was not guilty of "disruptive behavior" on October 24 and November 26, 1988. The Hearing Panel, the only group ever to hear both sides, supports this position. Furthermore, the "pattern of disruptive behavior" was shown, again by sworn testimony, to be largely erroneous or frivolous while "repeated warnings and counseling" were non-existent with the notable exception of Dr. Stall's advice.

Finally, as I pointed out in the October 19 Board meeting, the last sanction declaring "permanent suspension" for "any further display" is unrealistic and impossible.

As stated in previous letters, I desire to serve this community by practicing quality vascular surgery - all the rumors,

slanders, and expense generated by this problem notwithstanding. As my practice depends entirely upon the generosity of the Board, I pledge to abide by its recommendations to the best of my ability. By signing I do not waive or restrict my rights to due process of law or other civil rights as a medical staff member and American citizen.

My Best Wishes for a Merry Christmas and hopefully a better New Year.

Sincerely,

/s/ Floyd Bryan

Floyd T. Bryan, M.D.

cc: George Moss

Q. Let he ask you to assume, sir, that it is the letter that finally came out following the Ryan [*sic*] panel which set certain parameters for conduct for Dr. Bryan. Would you assume that for me, sir,
hypothetically?

A. Okay, yes.

Q. Directing your attention, sir, to the second paragraph or your first paragraph, it says your inability to work harmoniously with others has severely disrupted the balance, this is the first paragraph of the letter.

A. Okay.

Q. That wasn't the finding of your hearing panel, was it?

MR. KAY: Let me just object, Your Honor. He's already testified what the narrow scope of his hearing panel was and what their findings were.

A. No, I don't think it was.

THE COURT: Overruled.

Q. I'm sorry.
A. No, I don't think that was the finding of our panel.

Q. All right, sir. And the whole basis, if you've read through this letter or skimmed, let he ask you to assume that it speaks about a long history of

disruptive behavior. Was it the finding of the Ryan [*sic*] Panel charged to hear the evidence in this case that Dr. Bryan had a long history of disruptive behavior?

MR. KAY: Objection to the form of the question. It's leading, it's also outside the scope.

THE COURT: Overruled.

A. No, that was not the finding of the panel. That was not our charge.

Q. Directing your attention to the fourth paragraph, it reads, does it not, your non-constructive criticism directed to nursing personnel and other employees has intimidated them, undermined their confidence, belittled them and imputed stupidity, bad motives or incompetence. Did you find any evidence that Dr Bryan set out to practice medicine in that way?

A. No, I don't think so, but I don't think there's any physician on the staff at Holmes Medical Center that hasn't said some things to personnel at the hospital that they later regretted.

Q. All right, sir.

A. But that was not our job to judge him.

Q. And the last paragraph that speaks about a negative comment on the chart, do you recall asking question after question of witness concerning

doctors whether or not it was right to write the truth down on a chart, even if it involved criticism of other doctors or nurses?

A. I remember that.

Q. Did you find that Dr. Bryan's writing the truth or what he thought was the truth on the chart was inappropriate behavior?

A. I'm not sure it was wise, but neither am I sure it was inappropriate.

Q. All right, sir. Thank you. And continuing with the letter, do you recall, sir, testimony submitted by Dr. Bryan, by me through Dr. Bryan concerning his attempts to correct nursing personnel that weren't meeting his standards?

A. Yes.

Q. Was he given any satisfaction?

A. No.

Q. Continuing, the Board is in agreement with the Medical Staff Executive Committee and finds you have been guilty of inappropriate and disruptive -- well, we've already asked that. How about this one, your pattern of disruptive behavior is well documented and has persisted over a period of years, notwithstanding repeated oral and written warnings, and is clearly beyond acceptable standards of personal behavior and

is a threat to patient's care.

Let me ask you to say, sir, that you're the only panel that's ever heard Dr. Bryan's side of some of these incident reports. Was that your finding?

A. No.

Q. Doctor, finishing up the letter, number four, would you read that one out loud, sir?

A. You are advised that any further display of unprofessional and disruptive conduct will not be tolerated and will result in the permanent suspension of your clinical privileges at this hospital.

Q. Being present at the hearing panel, did you find any reason where a punishment such as that should be imposed on Dr. Bryan? Was that the recommendation of your committee?

A. No, it was not.

Q. Was it even the recommendation of the Medical Executive Committee as best you know?

A. Well, I really I don't know what went on in that committee. I can't attest to that.

Q. In essence, does that -- well, it says what it says, Your Honor, I'm sorry.

When you read that the hearing panel does not condone the actions of Dr. Bryan, would you explain to the jury what in your opinion that means?

MR. KAY: Objection. Just calls for speculation on the part of this witness and it's written by Dr. Ryan [*sic*], not by this witness.

THE COURT: He can give his opinion as a member of the panel what his findings were.

A. Well, I think that what Dr. Ryan [*sic*] wrote was the consensus opinion of the panel.

Q. And what was your understanding?

A. My understanding was certainly nobody condones actions that are disruptive, that cause problems on the floor, in the operating room, anywhere, but as I recall, we were, we were impressed by the lack of fairness in this whole procedure.

MR. KAY: Objection, move to strike.

THE COURT: Overruled.

A. That's not to say that Dr. Bryan doesn't have some problems. I guess if he didn't have any problems, we wouldn't be here. We all have problems. It's a matter of degree. Our panel did not feel, as I recall in speaking for them, that any one incidence was of sufficient magnitude to result in the punishment that he received, nor did we feel that the method in which the incidents were reported and dealt with were properly done, and as a result of that we did not feel that perhaps the sum total was worthy of the actions